163 U.S. 617

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 717.

THE LYONS-THOMAS HARDWARE COMPANY, THE FARMERS' AND MERCHANTS' BANK, THE PARIS EXCHANGE BANK, ET AL., PLAINTIFFS IN ERROR,

vs.

THE PERRY STOVE MANUFACTURING COMPANY, SCHOVERLING, DALY & GALES, MERCHANT & CO., ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

RECORD FILED AUGUST 24, 1895.

(16,007.)

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INDEX.

	Page.
Proceedings in district court	1
Original petition, filed November 20, 1889	1
First amended original petition, filed August 7, 1890	6
Second amended original petition, filed March 30, 1891	15
Exhibit A—Schedule showing names of persons and corporations, creditors of the "hardware company," having judgments in the district court of Lamar county, Texas, for their respective debts	23
Exhibit B—Schedule showing names of persons and corporations, creditors of the "hardware company," having judgments in the county court of Lamar county, Texas, for their respective debts	25
Exhibit C—Schedule showing creditors of the "hardware company" having judgments in the justice's court of precinct No. 1, in Lamar county, Texas, for their respective debts	26
Exhibit D—Schedule of creditors who have not sued	26

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Page.
Defendant Harrison's first supplemental answer..... 26
Plea of intervention..... 28
Answer of defendants except Baker Wire Co..... 31
Deeds, hardware company to Harrison, trustee, November 9, 1889. 36
Plea of intervention of the Farmers' and Merchants' bank 43
Exhibit A—Deed, hardware company to Harrison, trustee, November 9, 1889..... 46
Answer of Baker Wire Co..... 50
Answer of W. T. Gunn *et al*..... 51
First supplemental petition, filed April 7, 1891..... 52
Withdrawal of answer of Baker Wire Co. 53
Judgment, November 29, 1889..... 54
Judgment, May 4, 1891..... 57
Findings of law and facts by the court..... 60
Appellants' amended assignment of errors..... 62
L. P. Harrison's amended assignment of errors..... 64
Order of supreme court on questions certified..... 66
Judgment of the court of civil appeals, January 31, 1894..... 66
Judgment of the supreme court..... 67
Motion for rehearing..... 68
Order overruling motion for rehearing..... 72
Assignment of errors..... 73

(Record, p. 1.)

(*Caption.*)

THE STATE OF TEXAS, }
County of Lamar. }

At a regular term of the district court begun and holden within and for the county of Lamar, at the court-house thereof, in the city of Paris, on the 30th day of March, A. D. 1891, and which adjourned on the 16th day of May, A. D. 1891, the Hon. E. D. McClellan, judge thereof, presiding, the following cause came on for trial, to wit:

THE PERRY STOVE MANUFACTURING COMPANY *et al.*
vs.
LYONS-THOMAS HARDWARE COMPANY *et al.* } No. 4691.

(Record, p. 1.)

(*Original Petition. Filed Nov.* 20, 1889.)

STATE OF TEXAS, }
Lamar County. }

In District Court, Spring Term, 1890.

To the Hon. E. D. McClellan, judge of the 6th judicial district of Texas:

The petition of the Perry Stove Manufacturing Company, a private corporation duly incorporated under and by virtue of the laws of the State of Tennessee; Schoverling, Daly & Gales, a partnership doing a mercantile business in the city and State of New York, which firm is composed of August Schoverling and Charles Daly, who resides in the State of New York, and of Joseph Gales, who resides in the State of New Jersey; and of the Reading Hardware Company, a private corporation duly and legally incorporated under and by virtue of the laws of Pennsylvania; and of J. Rosenblatt & Co., a partnership doing business in Baltimore, Maryland, which is composed of J. Rosenblatt and —— ——, all of whom reside in the State of Maryland; and of the Ansonia Clock Company, a private corporation under and by virtue of the laws of Connecticut; and of the Central Stamping Company, a private corporation under and by virtue of the laws of the State of New York, complaining of the defendants The Lyons-Thomas Hardware Company, a private trading corporation incorporated under and by virtue of the laws of Texas, whose president is Joe Lyons and whose secretary is Julius Record, and said Joe Lyons, Julius Record, and Percy Preston, all of whom reside in Lamar county, Texas, and, as plaintiffs are informed and believe and charges, are the only stockholders in said corporation; complaining also of L. P. Harrison, who resides in said county of Lamar, and of the Baker Wire Company, who are unknown to

plaintiff-, would respectfully represent unto your honor that on the 9th day of November, 1889, the said "Lyons-Thomas Hardware Company" was and now is an insolvent corporation unable to pay its debts; that these plaintiffs and many other persons, firms, and corporations were and now are creditors of said corporation; that said creditors are numerous and not all known to plaintiffs nor can — give all their names, residences, or the amounts of their respective debts, but that defendant corporation was, on said 9th day of November, 1889, and now is indebted to the plaintiff Perry Stove Manufacturing Company by note in the sum of nine hundred and twenty-five & $\frac{5}{100}$ —; and to Schoverling, Daly & Gales in the sum of eight hundred and forty-nine $\frac{84}{100}$ dollars; Reading Hardware Company in the sum of one thousand and ninety-five & $\frac{4}{100}$ dollars; J. Rosenblatt & Co. in the sum of $—; to the Ansonia Clock Company the sum of nine hundred and fifty-four dollars and seventy-three cents; to the Central Stamp Company in the sum of five hundred and eighteen dollars and twenty-eight cents; and said corporation, "Lyons-Thomas Hardware Company," is also jointly indebted to many other creditors in large sums of money, and who desire to and will join in this bill, whose names in full, together with the amounts of their respective claims, plaintiffs are not now fully informed, but for whose benefit this bill is filed, as well as for other creditors, all of which debts are owing and unpaid.

Plaintiffs further state that on the said 9th day of November, 1889, the said defendant corporation, by its president, Joe Lyons, and its secretary, Julius Record, made, executed, and delivered to L. P. Harrison, defendant herein, as trustee, three several deeds of trust conveying to him in trust all the goods, wares and merchandise, notes, stocks, accounts, horses, wagons, and vehicles, and all other real and personal property of said corporation, to be by him sold and disposed of and handled by said trustee. All of said personal property was conveyed in the first of said deeds of trust, and the proceeds thereof to be paid in the following order to & preferring over all other creditors the following:

1st. Overdraft to the Farmers' and Merchants' Bank of Paris, Texas, for $6,514.85.

2nd. Note to Farmers' & Merchants' bank, $13,308.60, with Joe Lyons, Julius Record, L. P. Harrison, J. D. Thomas as sureties on said note, and C. I. Broad and N. H. Ragland endorsers thereon.

3rd. Note to the same bank for $10,750.00, with Joe Lyons, Julius Record, L. P. Harrison, and N. H. Ragland and C. I. Broad as sureties.

4th. Note to same bank for $11,072.50, with same securities as the last above named note.

5th. Note to the Paris Exchange bank for $3,333.35, with Joe Lyons, Julius Record, T. J. Record, John C. Gibbons, and W. T. Gunn as sureties.

6th. Note to the Paris Exchange bank for $3,370.75, with Joe Lyons, Julius Record, T. J. Record, and C. I. Broad as sureties thereon, making a total amount of first-preferred debts $48,350.03.

By the second deed of trust there was conveyed to said trustee

the two-story stone-house property (real estate), fifty feet front on Grand avenue, in Paris, Texas, by 100 feet back, and the powder-magazine property at the intersection of North Main street and the Santa Fé railway track, in Paris, Texas, to be disposed of by said trustee and the proceeds to be applied to and preferring the following debts in the order named:

1st. Note to L. P. Harrison for $1,000.00.

2nd. Note to L. P. Harrison, 250.00.

3rd. Note to L. P. Harrison (not yet due) for 300.00.

4th. Superior Wire Co. note (not yet due) for $1,000.00, with L. P. Harrison surety thereon.

5th. Laughlin Nail Co. note (not due) for $485.75, with Joe Lyons and L. P. Harrison as sureties thereon.

6th. Curtis Bros. & Co. note (not then due) for $350.00.

7th. Curtis Bros. & Co. note (not yet due) for $350.00.

8th. Curtis Bros. & Co. note (not yet due) for 477.25.

Total amount of claims preferred in 2nd deed of trust (on real estate) $4,213.00.

The 3rd deed of trust constituted a second deed of trust on both real estate and personal property, embracing all the property covered and conveyed by the two preceding deeds, the proceeds of which, after paying all prior claims, were to be applied to the following claims:

The Phillips Burtorf Mfg. Co.	$1,876 26
Manning Bowman & Co.	1,892 10
Peck, Stow, Wilcox & Co.	2,084 03
L. Waterberry & Co.	2,849 00
Sargent & Co.	1,667 50
Henry Sears & Co.	1,728 98
Baker Wire Co.	1,956 94
Meriden Cutlery Co.	2,130 58
Superior Wire Co.	2,360 98
W. M. Rodgers Mfg. Co.	2,169 60
Koeller Schmitz Cutlery Co.	2,850 00
Racine Hardware Co.	2,092 65
Making total amount of debts preferred in the 3rd deed of trust	$25,575 60

Plaintiffs further state that each and all of said trust deeds were delivered to the trustee, L. P. Harrison, and filed for record in the office of the clerk of the county court of said county of Lamar on the 9th of Nov., 1889, and they are now of record in his office, and the defendants are notified to produce them in court on the trial of this cause, or secondary evidence of their existence and contents will be resorted to.

Plaintiffs further state that on said 9th day of November, 1889, the said Lyons-Thomas Hardware Co. delivered possession to L. P. Harrison, trustee aforesaid, of all of said real and personal property conveyed to him aforesaid, and he is now proposing to sell the same in the execution of said trust.

Plaintiffs further state that by virtue of a writ of sequestration the Baker Wire Company, represented by H. D. McDonald & Ross & Scott, att'ys, have levied upon and taken from the possession of said trustee five hundred and sixteen bales of barbed wire, 53 kegs of painted staples, and five kegs of galvanized staples, being a part of said stock, and are claiming the same, although sold by the Baker Wire Co. and delivered to said corporation before the date of said deeds of trust, and said goods were still in Paris and undisposed of.

Plaintiffs further state that they are informed and believe, and so charge, that there are a number of other creditors not named herein, but they are at present unable to state their names or the amount of their respective claims, but that whenever known they may be recognized as creditors entitled to share in the equal distribution of the assets of defendant corporation according to the amount of their respective claims.

Plaintiffs further state that said defendant corporation is insolvent, and its assets, they believe and charge, are grossly inadequate to pay its debts and enough cannot be realized out of them to pay its debts, which fact was known to its members at and before the execution of said deeds of trust and at and before it preferred the debts upon which its members were individually liable as either surety or endorsers, and that said trustee refuses to recognize all valid claims against said corporation as being entitled to equal right to payment *pro tanto* out of the assets, and he and the officers and stockholders of said corporation claim and insist on paying said preferred claims out of the assets to the exclusion of all others, and refuse to recognize the right of the non-preferred creditors to be paid ratably out of the assets of said insolvent corporation, and if permitted to carry out said deeds of trust according to their provisions and requirements *and* many of its creditors, including the pl'ffs herein and many others, will receive nothing on their debts for the want of assets after the preferred debts are all paid.

Plaintiffs further state that they are informed and believe and they charge that said members of said corporation now owe a large amount of unpaid stock in said corporation, the amount whereof they do not at present know, but will ascertain and show on the trial of this cause.

Plaintiffs further state that they are each just creditors of said corporation for goods, wares, and merchandise sold and delivered to said corporation, much of which goods is now on hand, in the possession of said trustee, with which and from the proceeds of which by virtue of authority of said deeds of trust he is seeking to pay said preferred debts, and they believe and charge that the creditors not named in either of said deeds of trust and of whom no mention is made represent and hold about $25,000.00 of indebtedness against said corporation, no part of which will be paid, either in whole or in part, under and by virtue of the provisions of said trust deeds, and if said preferred debts be paid out of the assets of said insolvent corporation it will relieve the members, officers, and stockholders thereof from liability on said preferred debts, either as

surety or endorser, to the great detriment of the unsecured, non-preferred creditors, and the latter will be left remediless.

Plaintiffs say they bring this suit for the benefit and equality of all the creditors of said corporation and to secure a ratable distribution of its assets and to prevent the preferences to its stockholders, officers, members, and others being preferred, which preferences so attempted by said trust deed work a fraud on all the non-preferred creditors and is without authority of law and inequitable; and they say that the assets of said insolvent corporation *is* a trust fund for the benefit of all its creditors ratably, and neither the members, officer-, — stockholders of the corporation or said trustee have a right to pay said preferred debts to the exclusion of other just creditors.

Wherefore, for themselves and on behalf of all the creditors of said Lyons-Thomas Hardware Company, they bring this suit to compel the just and equal distribution of the assets of said corporation among its creditors, and they ask the court to grant a temporary restraining order to prevent the defendant L. P. Harrison, trustee as aforesaid, and any and all of said defendants from further interfering with or disposing of any of the assets of said Lyons-Thomas Hardware Company pending this application for a receiver, and upon a hearing of this application your honor appoint a receiver to take possession of all the property, effects, and assets of every kind belonging to said Lyons-Thomas Hardware Company, and under the order and directions of the court sell and dispose of the same to the best advantage for cash, and bring the money into court for distribution according to the rights of the respective claims, and they pray that the defendants be cited to answer this bill and on final hearing that the court make a just and equal distribution of the proceeds of the assets of said insolvent corporation ratably among all who can show themselves to be creditors and as such to share in said distribution, and they pray for costs and for all relief to which they are entitled, legal or equitable, general or special.

HALE & HALE &
HILL & STURGEON,
Att'ys for Petitioners.

STATE OF TEXAS, }
Lamar County. }

V. W. Hale, one of the attorneys for the within above-named plaintiffs, being sworn, states that the above and foregoing petition and the facts therein stated are true.

V. W. HALE.

Sworn to and subscribed before me on this the 19th day of Nov., A. D. 1889.

[SEAL.]

W. R. WOOD,
Clerk Dist. Ct., Lamar Co., Tex.,
By W. B. KAVANAUGH, *Deputy.*

AT CHAMBERS, CLARKSVILLE, TEXAS, *Nov. 20th*, 1889.

To the clerk of the district court of Lamar county, Texas:

You are hereby ordered to issue the writ of injunction prayed for in the within petition, enjoining and restraining the within-named defendants, Jo. Lyons, Julius Record, Percy Preston, L. P. Harrison, and The Baker Wire Company, and their agents, employés, and all other persons acting by or under their authority from selling or otherwise disposing of any or all of the goods, wares, merchandise, and real estate described in the three several deeds of trust mentioned in the within petition, and you are further ordered to forthwith issue to each of the above-named defendants a notice in writing to appear before me on Friday, the 29th day of November, 1889, at 8½ o'clock a. m., at the court-house of Red River county, Texas, in the city of Clarksville, then and there to answer the within petition and to show cause, if any they have, why a receiver should not be appointed as prayed for.

Given under my hand the day and date first above written.

E. D. McCLELLAN,
Judge of the 6th Judicial District of Texas.

(Indorsed:) The Perry Stove Mfg. Co. *et al. vs.* Lyons-Thomas Hardware Co. *et al.* No. 4691. Original petition. Filed Nov. 20th, 1889. W. R. Wood, clerk dist. ct., Lamar Co., Tex., by W. B. Kavanaugh, deputy. We hereby except service and waive further notice of the within order for injunction and agree to appear before Judge McClellan at such time as may be agreed upon by counsel or at time mentioned. This Nov. 20. By Maxey, Lightfoot & Denton, att'ys for all the defendants except Baker Wire Co. Baker Wire Co., by Ross & Scott & H. D. McDonald, att'ys.

(Record, p. 8.)

(*1st Amended Original Petition. Filed Aug.* 7, 1890)

In District Court, Lamar County, Texas.

THE PERRY STOVE MFG. CO. *et al.*
v.
THE LYONS-THOMAS HARDWARE COMPANY *et al.* } 4691.

Leave of court first obtained, the plaintiffs come and file this their first amended original petition in lieu of the original, filed on the 20th day of November, 1889, and allege that the following-named plaintiffs are judgment creditors of the defendant The Lyons-Thomas Hardware Company, a private corporation under and by virtue of the laws of Texas, and which on the 9th day of November, 1889, was and is now insolvent, and it ceased to carry on its business on the 9th day of November, 1889, and still fails to continue its business of buying and selling hardware and other articles of merchandise (to wit): Schoverling, Daly & Gales, a partnership doing business as merchants in the city and State of New

York, which firm is composed of August Schoverling and Charles Daly, who reside in the State of New York, and Joseph Gales, who resides in the State of New Jersey, whose judgment was rendered in the district court of Lamar county, Texas, on the 15th day of May, 1890, for the sum of $875.39; also Henry W. Merchant and Clarke Merchant, who reside in the city of Philadelphia, in the State of Pennsylvania, and who compose a mercantile firm doing business in said city of Philadelphia in the firm name and style of Merchant & Co., who hold a judgment for $1,167.63 against the Lyons-Thomas Hardware Co., rendered by your honor's court on the 15th day of May, 1890; also the Potters Co-operative Co., who hold and own a judgment for $1,592.83; the Favorite Stove & Range Co.; the Perry Stove & Manufacturing Co., which holds and owns a judgment for $952.80; the Jos. Hafner Mfg. Co., which holds and owns a judgment for $942.88; the Miami stove works, which owns and holds a judgment for $710.21; the Reading Hardware Co., which owns and holds a judgment for $1,128.01, all rendered by the district court of Lamar county, Texas, on the 15th day of May, 1890, together with costs, and all draw 8 % interest per annum from the date of rendition.

J. H. Baum, who owns and holds a judgment for $414.37, rendered June 4th, 1890; Haynes Carriage Co., — owns and holds a judgment for $353.05, dated March 5, 1890; J. Rosenblatt & Co., who own and hold a judgment for $334.82, dated March 5th, 1890; the last-named three judgments were rendered by the county court of Lamar county, Texas, and draw 8 % interest per annum from rendition, and for costs; J. Patterson & Son, who own and hold a judgment for $81.24, dated March 31st, 1890; the Bronson Supply Co., who hold and own a judgment for $89.20, dated January 27th, 1890, both rendered in justice's court, precinct No. 1, Lamar county, Texas, with costs, and draw 8 % interest per annum; also a judgment of said county court for $488.06 and costs in favor of the Central Stamping Company, with the same interest from date, and dated March 5th, 1890.

Also the following judgments rendered in favor of the following-named parties respectively in the district court of Lamar county, Texas, together with costs (to wit):

Peter Wright & Sons	$720 48
B. Kittridge Arms Co.	1,199 50
Junction Iron Co.	628 55
The Alaska Refrigerator Co.	1,222 66
P. Wilson Sons & Co.	980 15
Alfred Field & Co.	1,678 85
The Ansonia Clock Co.	983 37
Knowles, Taylor & Knowles	591 48

all drawing 8 % per annum from date.

The following-named persons, firms, and corporations are just creditors of said Lyons-Thomas Hardware Company, but who have not yet obtained judgment on their respective claims, but which are valid *bona fide* debts now due (to wit): St. Louis Shovel Co. for

$1,174.50 & interest; Keller & Schmitz, of New York, for about $2,900.00, with interest; Griswold Bros., of New York, $918.23, with interest; Bristol Brass & Clock Co. of Conn., $339.35, with interest.

The above-named plaintiffs, being creditors of the said Lyons-Thomas Hardware Company, file this creditors' bill against said hardware company for themselves and on behalf of all other creditors who desire to come in and accept the benefits of it and contribute to the payment of its costs and burdens and share ratably the asset- and funds of said Lyons-Thomas Hardware Company.

The said plaintiffs complain of the defendants, The Lyons-Thomas Hardware Company, L. P. Harrison, who resides in Lamar county, Texas; The Farmers' & Merchants' Bank, The Paris Exchange Bank, both of which banks are duly incorporated under and by virtue of the laws of Texas and are doing a banking business in Paris, Lamar county, Texas, and of N. H. Ragland, C. I. Broad, J. C. Gibbons, T. J. Record, W. T. Gunn, and J. D. Thomas, all of whom reside in Lamar county, Texas, and all of whom, except the Lyons-Thomas Hardware Company, L. P. Harrison, and the Paris Exchange Bank, voluntarily made themselves parties to this bill.

The plaintiffs represent to your honor that on or about the 9th day of November, 1889, the said Lyons-Thomas Hardware Company was and now is insolvent, unable to pay its debts, and is now and was then unable and unwilling to continue its business, which was that of buying, selling, and otherwise dealing in hardware and other articles of merchandise, or to longer carry out the objects of it- creation for which it was chartered; that these plaintiffs and other persons, firms, and corporations were then and now are *bona fide* creditors of said corporation, and that said Lyons-Thomas Hardware Company on said 9th day of November, 1889, was composed of Joe Lyons and Julius P. Record, the former being president, the latter being secretary, both of whom being resident citizens of Lamar county, Texas.

Plaintiffs further state that on said 9th day of November, 1889, the said Lyons-Thomas Hardware Company (hereinafter styled the hardware company), by its president, Joe Lyons, and its secretary, Julius P. Record, for the purpose and with the intent to defraud its creditors, including these plaintiffs, and also to give an undue and illegal preference to their codefendants in this bill, and also to prefer themselves as individual indorsers on a large indebtedness owing to their codefendants, The Farmers' & Merchants' Bank, The Paris Exchange Bank, and to prefer out of the assets of said insolvent hardware company the defendants N. H. Ragland, C. I. Broad, J. C. Gibbons, T. J. Record, W. T. Gunn, and J. D. Thomas as indorsers for said hardware company to said banks, made, executed, and delivered to L. P. Harrison, as trustee, three several chattel mortgages or deeds of trust, conveying to him in trust all the goods, wares, and merchandise, notes, stock, accounts, horses, wagons, and vehicles and all other available assets of said hardware company, including real estate and personal property of said hardware company, to be by said trustee sold and disposed of and handled by said trustee for the benefit of said preferred individuals and corporations

aforesaid. All of said personal property was conveyed in the first chattel mortgage or deed of trust, with the direction to said trustee to apply the proceeds thereof as follows, preferring over all other creditors the following:

1st. Overdraft to the Farmers' & Merchants' Bank of Paris, Texas, for $6,514.85.

2nd. Note to said Farmers' & Merchants' bank for $13,308.60, with Joe Lyons, Julius P. Record, L. P. Harrison, J. D. Thomas as sureties thereon, and C. I. Broad and N. H. Ragland as endorsers or guarantors thereon.

3rd. Note to same bank for $10,750.00, with Joe Lyons, Julius P. Record, L. P. Harrison, N. H. Ragland, and C. I. Broad as sureties.

4th. Note to same bank for $11,072.50, with same sureties as last above named note.

5th. Note to the Paris Exchange bank for $3,333.35, with Joe Lyons, Julius P. Record, T. J. Record, John C. Gibbons, & W. T. Gunn as sureties thereon.

6th. Note to the Paris Exchange bank for $3,370.75, with Joe Lyons, Julius P. Record, and C. I. Broad as sureties thereon, making a total amount of first-preferred debts of $48,350.03. By the second chattel mortgage or deed of trust there was conve-d and delivered to said trustee a two-story brick storehouse (real estate) fronting fifty feet on Grand avenue, in Paris, Texas, running back a hundred feet, and the lot on which building is & was situate; also the powder-magazine property (real estate) situate at the intersection of North Main street and the G., C. & S. F. R'y track, in Paris, Texas, to be disposed of by said trustee and the proceeds applied to & preferring the following so-called debts in -he order named as follows:

1st.	Note to L. P. Harrison for	$1,000 00
2nd.	Note to L. P. Harrison	250 00
3rd.	Note to L. P. Harrison (not then due)	300 00
4th.	Superior Wire Co. note, not then due, with L. P. Harrison surety thereon	1,000 00
5th.	Laughlin Nail Co. note, not then due, with Joe Lyons & L. P. Harrison as sureties thereon	485 75
6th.	Curtis Bros. & Co. note, not then due	350 00
7th.	Curtis Bros. & Co. note, not then due	350 00
8th.	Curtis Bros. & Co. note, not then due	477 25
	Total amount of claims preferred in 2nd deed of trust or mortgage	4,213 00

The 3rd chattel mortgage or deed — trust constituted a second deed of trust on both real estate and personal property, embracing all the property covered and conveyed by the two preceding deeds, the proceeds of which, by the terms of said instrument, after paying all the prior preferred claims, were to be applied to the payment of the following claims (to wit):

The Phillips Burtorf Mfg. Co. for	$1,876 26
Manning Bowman & Co	2,084 03
L. Waterberry & Co	2,849 00
Sargeant & Co	1,667 50
Henry Sears & Co	1,728 98
Baker Wire Co	1,956 94
Meriden Cutlery Co	2,130 58
Superior Wire Co	2,360 98
W. M. Rodgers Mfg. Co	2,169 60
Koeller Schmitz Cutlery Co	2,850 00
Racine Hardware Co	2,092 65

making the total amount of debts preferred in the 3rd chattel mortgage or deed of trust *is* $25,575.60.

Plaintiffs further state that each and all of the aforesaid three chattel mortgages or deeds of trust were delivered the trustee, L. P. Harrison, on the 9th day of November, 1889, and were by him on the same day caused to be filed and recorded in the office of the clerk of the county court of Lamar county, Texas, and the said trustee accepted the trust and proceeded to its execution. Said three instruments are in the possession of the defendant L. P. Harrison, and he and the other defendants are hereby notified to produce them in court on the trial of this cause, or secondary evidence of their existence & contents will be introduced.

Plaintiffs further state that on said 9th day of November, 1889 the said Lyons-Thomas Hardware Company delivered to said trustee all of said real estate and personal property conveyed to him as aforesaid, and he has sold or otherwise disposed of the same in the pretended execution of said trust, and has not, but refuses to pay over to the plaintiff- or either of them any part of the property transferred and delivered to him as aforesaid or any of its proceeds, and neither of these plaintiffs has received anything on his or their claim from the assets of said hardware company or from any other source.

Plaintiffs further state that the personal property and personal assets conveyed by said hardware company by the three aforesaid conveyances to L. P. Harrison, trustee, and delivered to him constituted the entire personal assets of said hardware company, and together with the real estate so conveyed and delivered to him constituted the entire available assets of every kind or character owned, controlled, claimed, or possessed by it, the value of all which at the time of the conveyance and delivery to said trustee was not less than one hundred and ten thousand dollars, and the aggregate indebtedness of said hardware company was largely in excess of its entire assets, but plaintiffs are unable to state the exact amount of such indebtedness.

Plaintiffs further state that they are informed and believe and they charge that there are a number of other creditors of said hardware company not herein named, and whose names or the amount of their respective claims pl'ffs are unable to state, but who whenever known will be recognized as creditors and entitled to share in

the ratable distribution of the assets of said "hardware company" if they come in under the terms and conditions of the law.

Plaintiffs further state that said "hardware company" was on the 9th day of November, 1889, and now is totally insolvent and unable to and unwilling to pay its debts, and that it made the conveyances aforesaid to said trustee for the purpose and with the intent to cease to carry on its business for which it was created or any other legitimate business, and that it did then so cease to be a "going concern" and has not since done any business other than that done by said trustee in disposing of its assets and winding up its affairs; that on and before the 9th day of November, 1889, the members, stockholders, officers, and promoters of said "hardware company" corporation knew that said corporation was insolvent and that its available assets were inadequate to pay its debts, and they also knew of such insolvency at and before it preferred the debts preferred in said chattel mortgage and deeds of trust.

Plaintiffs further state that said trustee refuses to pay or recognize any claim or debt against said hardware company except said preferred claims until after the latter are all paid, and they have not yet been paid, and said trustee claims that the entire assets in his hands will not pay any debt except said preferred claims, if he has even enough to pay the latter, and he refuses to recognize pl'ffs' claims as being entitled to an equal or to any share in the distribution of said assets, and he and all the other defendants insist on the right to pay all of said preferred claims out of said assets to the exclusion of all other debts, and if the terms and provisions of said chattel mortgages and deeds of trust are carried out none of these plaintiffs nor any non-preferred creditor will receive anything on their respective debts.

Plaintiffs further state that they are informed and believe and charge that the members of said hardware company owed on the 9th day of November, 1889, a large amount of unpaid stock in said hardware company, the amount whereof they cannot now state.

Plaintiffs further state that they are and each of them is a just creditor of said "hardware company" for goods, wares, and merchandise sold and delivered by them and each of them to said "hardware company," much of which goods was on hand and delivered to said trustee when he took possession of the assets of said "hardware company," and with the proceeds of which defendants are seeking the payment of said preferred debts to the exclusion of all others, and they charge that the just non-preferred debts of said "hardware company" amount to fifty thousand dollars or more, and of which no mention is made in either of the said conveyances to said trustee, and they say that if said preferred debts be paid out of the assets of said "hardware company" the members, officers, and stockholders thereof will be relieved from their individual liability on said preferred debts either as surety, indorsers, or guarantors, to the detriment of the non-preferred creditors and in fraud of their rights.

Plaintiffs state that this suit is brought for the benefit and equality of all the creditors of said "hardware company" and to secure a

ratable distribution of its assets according to equity and to prevent fraudulent, illegal, and unjust preference to its members and others, and they say that the assets of said "hardware company" are a trust fund for the benefit of its just creditors ratably, and no right exists to divert said assets or the proceeds thereof from that equitable purpose.

Plaintiffs further allege that the defendant L. P. Harrison, trustee named in the aforesaid chattel mortgage & deeds of trust, took possession of all the property and assets of said "hardware company" tortiously and without authority of law, and all his dealings, transactions, and sales or other disposition of said trust property are void and illegal; that he has sold and otherwise disposed of all of said personal property, so that it is placed beyond the reach of these plaintiffs and of all the creditors of said hardware company, and the said L. P. Harrison wasted, mismanaged, and squandered said assets, and now claims that from the entire personal assets he realized only about the sum of $55,000, and pl'ffs allege and charge that the said personal assets which went into the hands of said L. P. Harrison were worth about $110,000 or more, and that the real estate was worth about $20,000, and that he sold it for about $—, he being the purchaser, all of which sales were made without authority of law and were made for a grossly inadequate consideration and to the detriment of the non-preferred creditors and was a gross waste and mismanagement of the assets of said "hardware company."

Plaintiffs further state that the defendant L. P. Harrison commenced to sell the property and assets of said hardware company on or about the 29th day of November, 1889, at private sale by both retail and wholesale, and so continued to dispose of the said property until about the 26th day of March, 1890, at which latter date he sold all that remained of the stock of hardware and other goods, wares, and merchandise in bulk at public auction, and the same was knocked off and sold to T. D. Craig, who is a brother-in-law of the said L. P. Harrison, when at the time of said sale the said T. D. Craig was absent from the State of Texas; that said property was sold at auction for $10,000 in bulk, and at the time of the sale a large portion of said goods was securely boxed up, so that outside parties, who desired to bid and would have bid on them could they have been seen, would not and did not bid on them, but would have given much more than $10,000 for them if they had had information or have known the amount, character, and quality of the goods so sold, and the said L. P. Harrison failed to furnish any invoice to any one at said sale of the stock he proposed to sell or to in any way enable bidders to approximately determine the value of the property offered for sale, all of which was done and participated in by the said L. P. Harrison for the purpose of preventing said property from bringing its value and of stifling competition of said sale, and it had the effect to prevent others from bidding, and plaintiffs charge and say the property sold at said auction sale and which was bid in for T. D. Craig was at the time worth $25,000 or more.

Plaintiffs further state that after said sale the said L. P. Harrison continued in the custody and had possession and control of the property sold, who proceeded to sell and offered to sell the same at both wholesale and retail, as best he could, until about the — day of ——, 1890, when he made a final sale of the remainder of said property, theretofore sold to T. D. Craig, to M. F. Allen, $— worth; to W. E. Masseuburg, $— worth, and to Hicks & Bettes, $— worth, and to various other parties, and at the time he made said closing sales the said T. D. Craig was absent from the State of Texas, and plaintiffs believe and charge that the said L. P. Harrison was an interested party and was the purchaser or one of the purchasers at the auction sale made by him at which said property was knocked off in the name of T. D. Craig for $10,000, and that he was interested in and shared the profits derived from said purchase.

Plaintiffs further state that the Perry Stove Mfg. Co., Schoverling, Daly & Gales, the Reading Hardware Co., J. Rosenblatt & Co., & the Ansonia Clock Company, for themselves and the other creditors of said "hardware company," defendant, *and* on the 20th day of November, 1889, filed in vacation the original creditors' bill against said "hardware company" and L. P. Harrison, trustee, and prayed for the appointment of a receiver of all the effects and assets of said hardware Co., to which bill all the other parties defendant and intervenors herein voluntarily made themselves parties, except the Paris Exchange bank, which has since been made a defendant and duly cited by the plaintiffs; that at chambers on the 29th day of November, 1889, your Hon. on the hearing of the application for a receiver refused to appoint one, but directed the trust to be executed by the said L. P. Harrison, trustee, under the direction of the court, and that he give bond for the faithful discharge of his duties as such trustee in the sum of $85,000.00, and he did give such bond with —— —— as sureties, which bond was executed prior to the time said L. P. Harrison disposed of any of said property.

Plaintiffs further say that each and all of said chattel mortgages or deeds of trust are fraudulent, without authority of law for the reasons hereinbefore stated, and all the acts and proceedings of said trustee made, had, and done under and by virtue thereof or based thereon or in pursuance thereof or of the order of the court aforesaid are without authority of law and afford no protection to said trustee.

Plaintiffs further state that they are informed and believe and therefore charge that prior to the 9th day of November, 1889, the said L. P. Harrison was a member of the Lyons-Thomas Hardware Corporation, and that he was the owner of unpaid stock therein to the amount of fifteen thousand dollars; that only a day or two prior to the said 9th day of November, 1889, for the purpose of and with the intent to avoid individual liability thereon, and with a full knowledge that said corporation was insolvent, unable to pay its debts, and that it then intended to fraudulently transfer all its assets to him as trustee to pay the above-mentioned preferred creditors, including himself, transferred and delivered said unpaid stock to

Joe Lyons, who was at the time and now is totally insolvent, well knowing at the time that said Joe Lyons was wholly insolvent.

Plaintiffs further state that they are not sufficiently informed as to whether the said L. P. Harrison has paid off any of the said preferred claims or any part thereof to allege that he has or has not done so, but they allege if any payment has been made by him out of the assets of said "hardware company" to any preferred creditor or creditors, the creditors or creditors who received it did so with a full knowledge of the pendency of this creditors' bill, and that no such payment or payments were made, if at all, until subsequent to the 29th day of November, 1889, and was paid to a person or parties then defendant or intervenors in this bill.

Plaintiffs further state that —— ——, all of whom reside in Lamar county, Texas, are the sureties for the defendant L. P. Harrison on his bond executed by him as trustee for $85,000.00 under the direction of the judge of this court at chambers on the 29th day of November, 1889, and they say that said bond was conditioned for the faithful performance of said trust, and that he would pay into court and fully account for all the proceeds of said trust property in his hands, but they allege that he has committed a breach of said bond and has not accounted for the assets in his hands, but that he has wasted, squandered, and mismanaged said assets as aforesaid, and did not faithfully execute his duties as trustee, and if the court should hold and be of opinion that said chattel mortgage and deeds of trust are valid and the order of the judge requiring the execution of such bond are legal, valid, and binding, then pl'ffs ask judgment against said trustee for such amount as they may show is the difference between the value of the assets disposed of by said L. P. Harrison and the amount he could and ought to have realized from them and the amount he reports as actually realized from said assets, and they also pray that on the final hearing of this cause that said deeds of trust or mortgages be cancelled, set aside, and held for naught, and that all preferences in said instruments be set aside, and that all the assets of every kind of said Lyons-Thomas Hardware Company be adjudged a trust fund, and that it be distributed ratably among such creditors as show themselves entitled to a distributive share thereof, and they pray for a judgment against L. P. Harrison for the amount of his unpaid stock in def't hardware Co. owned by him or transferred by him on the eve of the insolvency or after or in view of insolvency, and for all waste and mismanagement of said corporate assets in his hands as trustee and not faithfully accounted for as may be shown by the evidence, and that equity be done in the premises, and they pray for costs and for general relief.

HALE & HALE &
HILL & STURGEON,
Att'ys for Pl'ffs.

V. W. Hale, being duly sworn, says he is one of the attorneys for plaintiffs in the above-entitled cause, and that the facts therein

stated of his own knowledge are true, and those stated upon information he believes to be true.

V. W. HALE.

Sworn to before me by the said V. W. Hale on this the 7th day of August, A. D. 1890.

[SEAL.] Witness my hand and seal of office — day and date above written.

W. R. WOOD,
Clerk Dist. Court, Lamar Co., Tex.

Indorsed: No. 4691. The Perry Stove Mfg. Co. *et al. vs.* The Lyons-Thomas Hardware Company *et al.* 1st amended original petition. Filed August 7, 1890. W. R. Wood, clerk dist. ct., Lamar Co., Tex.

(Record, p. 20.)

2nd Amended Original Petition.

In District Court, Lamar County, Texas.

THE PERRY STOVE MFG. CO. *et al.*
vs.
THE LYONS-THOMAS HARDWARE CO. *et al.* } No. 4691.

Leave of court first had and obtained, the plaintiffs come and file this their second amended original petition in lieu of their 1st amended original petition filed on the 7th day of August, 1890, and allege that the following-named plaintiffs are creditors of the Lyons-Thomas Hardware Company, a private corporation under the laws of Texas, and which is now and was on the 9th day of November, 1889, insolvent, and it ceased to carry on its business on said 9th day of November, 1889, and still fails to continue its business of buying and selling hardware and other articles of merchadise (to wit): Schoverling, Daly and Gale, a partnership doing business as merchants in the city and State of New York, which firm is composed of August Schoverling and Charles Daly, who reside in the State of New York, and Joseph Gales, who resides in the State of New Jersey; Henry W. Merchant and Clark Merchant, who reside in the State of Pennsylvania, and who compose a mercantile firm doing business in the city of Philadelphia in the firm name and style of "Merchant & Co.;" The Potter Co-operative Co., The Perry Stove Mfg. Co., The Favorite Stove & Range Co., The Joseph Hafner Mfg. Co., The Miami Stove Works, The Reading Hardware Co., J. H. Baum, J. Rosenblatt & Co., J. Patterson & Son, The Bronson Supply Co., The Central Stamping Co., Peter Wright & Sons, B. Kittridge Arms Co., Junction Arm-Co., The Alaska Refrigerator Co., R. Wilson & Co., Alfred Field & Co., The Ansonia Clock Co., Knowles, Taylor & Knowles, The St. Louis Shovel Co., Koeller & Schmitz, Griswold Bros., Bristol Brass & Clock Co., The Superior Barbed Wire Co., The Henry Sears Co., The Phillips Burtoff Mfg.

Co., Manning, Bowman & Co., The Racine Hardware Co., Peck, Stowe & Wilcox, Hubbard & Co., Adolph Kastor Bro., The Consolidated Manufacturing Company, The Quincy Showcase Co., The Ferris Hame Co., The Paint Bottle Works, J. Leopold & Co., J. R. Torry & Co., Stephens & Co., F. Myrose & Co., Brumwell Brush & Wire Goods Co., R. Wallace & Sons, Simpson, Hall & Miller & Co. (Plaintiffs further state that there are other debts against the said "hardware company" not herein enumerated amounting to not less than $5,000.00, and the aggregate indebtedness herein named, exclusive of said $5,000.00, amounts to the sum of $109,869.24.)

The above-named plaintiffs, with many others, being creditors of the Lyons-Thomas Hardware Company (hereinafter styled the hardware company), whose names, the amount of their respective claims, the rate of interest, and whether judgment creditors or otherwise will be shown on Exhibits "A," "B," "C," "D," come and file this creditors' bill against the said hardware company defendant and its codefendants and intervenors for the plaintiffs and on behalf of all other creditors who desire to come in and accept the benefits of it and contribute to the payment of its costs and burdens and share ratably the assets and funds of said hardware company defendant.

The said plaintiffs complain of the defendants The Lyons-Thomas Hardware Company, L. P. Harrison, who resides in Lamar county, Texas; The Farmers' & Merchants' Bank, The Paris Exchange Bank, both of which banks are duly incorporated under and by virtue of the laws of Texas and are and were doing a banking business in Paris, Lamar county, Texas, and of N. H. Ragland, C. I. Broad, J. C. Gibbons, T. J. Record, W. T. Gunn, and J. D. Thomas, intervenors, all of whom reside in Lamar county, Texas, and all of whom, except the Lyons-Thomas Hardware Company, L. P. Harrison, and the Paris Exchange bank, voluntarily made themselves parties to this bill.

The plaintiffs represent to your honor that on or about the 9th day of November, 1889, the said "hardware company" corporation was and now is & had long been insolvent, unable to pay its debts, and now is and was then unable and unwilling to pay its debts and continue its business, which was that of buying, selling, and otherwise dealing in hardware and other articles of merchandise or to longer carry out the object of its creation for which it was chartered; that the plaintiffs and other persons, firms, and corporations were then and now are *bona fide* creditors of said corporation, and that said "hardware company," on said 9th day of November, 1889, was composed of Joe Lyons and Julius P. Record, the following being president (to wit), Joe Lyons, and Julius P. Record being its secretary, both of whom being resident citizens of Lamar county, Texas.

Plaintiffs further state that on the said 9th day of November, 1889, the said "hardware Co.," by its president, Joe Lyons, and its secretary, Julius P. Record, for the purpose and with the intent to defraud its creditors, including these plaintiffs, and also to give an illegal and undue preference to their codefendants in this bill, and also to prefer themselves as individual endorsers on a large in-

debtedness owing to their codefendants, The Farmers' & Merchants' Bank, The Paris Exchange Bank, and to prefer out of the assets of said insolvent "hardware company" the intervenors N. H. Ragland, C. I. Broad, J. C. Gibbons, T. J. Record, W. T. Gunn, and J. D. Thomas, as indorsers for said "hardware company" to said Banks, made and delivered to L. P. Harrison, as trustee, three several chattel mortgages or deeds of trust, conveying to him in trust all the goods, wares and merchandise, notes, stock, accounts, horses, wagons and vehicles, and all other available assets of said "hardware Co.," including real estate and personal property of said "hardware Co.," to be by said trustee sold and disposed of and handled by said trustee for the benefit of said preferred individuals and corporations aforesaid. All of said personal property was conveyed in the first chattel mortgage or deed of trust with the directions to said trustee to apply the proceeds thereof as follows, preferring over all other creditors the following:

1st.	Overdraft to the Farmers' & Merchants' Bank of Paris, Texas, for	$6,514 85
2nd.	Note to the Farmers' & Merchants' bank, with Joe Lyons, Julius P. Record, L. P. Harrison, and J. D. Thomas as sureties thereon and C. I. Broad and N. H. Ragland as indorsers or guarantors thereon	13,308 60
3rd.	Note to the said bank for..... with Joe Lyons, Julius P. Record, L. P. Harrison, N. H. Ragland, and C. I. Broad as sureties.	10,750 00
4th.	Note to same bank for ..... with same sureties as on last above named note.	11,072 50
5th.	Note to the Paris Exchange bank for..... with Joe Lyons, Julius P. Record, T. J. Record, John C. Gibbons, and W. T. Gunn as sureties thereon.	3,333 35
6th.	Note to the Paris Exchange bank for..... with Joe Lyons, Julius P. Record, and C. I. Broad as sureties thereon.	3,370 75
	Making a total amount of first-preferred debts of	$48,350 03

By the 2nd deed of trust or mortgage there was conveyed and delivered to said trustee a two-story brick storehouse (real estate) fronting fifty feet on Grand avenue, in Paris, Texas, running back 100 feet, and the lot on which said building is & was situate; also the powder-magazine property (real estate), situate at the intersection of North Main street and the Gulf, Colorado & Santa Fé R'y track, in Paris, Texas, to be disposed of by said trustee and the proceeds applied to and preferring the following so-called debts in the order named as follows:

1st.	Note to L. P. Harrison for	$1,000 00
2nd.	Note to L. P. Harrison for..... .	250 00
3rd.	Note to L. P. Harrison for..... .	300 00
4th.	Superior Wire Co. note (not then due)..... with L. P. Harrison surety thereon.	1,000 00
5th.	Laughlin Nail Co. (note not then due)..... .. with Joe Lyons & L. P. Harrison as sureties thereon.	485 75
6th.	Curtis Bros. & Co.'s note, not then due, for.....	350 00
7th.	Curtis Bros. & Co.'s note, not then due, for.....	350 00
8th.	Curtis Bros. & Co.'s note, not then due	477 25
	Total amount of claims preferred in the 2nd deed of trust or mortgage	$4,213 00

The 3rd chattel mortgage or deed of trust constituted a second deed of trust on both real estate and personal property, embracing all the property covered and conveyed by the two preceding deeds, the proceeds of which by the terms of said instrument, after paying all the prior preferred claims, were to be applied to the payment of the following claims (to wit):

The Phillips Burtoff Mfg. Co. for.....	$1,876 26
Manning Bowman & Co.....	2,084 03
L. Waterbury & Co.....	2,849 00
Sargent & Co.....	1,667 50
Henry Sears & Co.....	1,728 98
Baker Wire Co.....	1,956 94
Meriden Cutlery Co.....	2,130 58
Superior Wire Co.....	2,367 98
W. M. Rogers Mfg. Co.....	2,169 60
Koeller Schmitz Cutlery Co.....	2,850 00
Racine Hardware Co.....	2,092 65
Making the total amount of debts preferred in the 3rd chattel mortgage or deed of trust....	$25,575 60

Plaintiffs further state that each and all of the aforesaid chattel mortgages or deeds of trust were delivered to the trustee, L. P. Harrison, on the 9th day of November, 1889, and were by him, on the same day, caused to be filed and recorded in the office of the clerk of the county court of Lamar county, Texas, and the said trustee accepted the trust and proceeded to its execution. Said three instruments are in the possession of the defendant L. P. Harrison and he and the other defendants are here notified to produce them in court on the trial of this cause, or secondary evidence of its existence and contents will be introduced.

Plaintiffs further state that on the said 9th day of November, 1889, the said "hardware company" delivered to said trustee all of said real and personal property conveyed to him as aforesaid, and he has sold or otherwise disposed of the same in the pretended execution of said trust and has not paid over, but refuses to pay

over, to the plaintiffs or either of them any part of the property transferred and delivered to him as aforesaid or any of its proceeds, and neither of these plaintiffs has received anything on his, her, or their respective debts or claims from the assets of said "hardware company" or from any other source.

Plaintiffs further state that the personal property and personal assets conveyed by said "hardware company" by the three aforesaid conveyances to L. P. Harrison, trustee, and delivered to him constituted the entire personal assets of said "hardware company," and, together with the real estate so conveyed and delivered to him, constituted the entire available assets of every kind or character owned, controlled, claimed, or possessed by it, the value of all which at the time of the conveyance and delivery to said trustee was not more than $75,000.00, and the aggregate indebtedness of said "hardware company" was largely in excess of its entire assets, but plaintiffs are unable to state the exact amount of such indebtedness, but they believe it was not less than $114,869.24.

Plaintiffs further state that they are informed and believe and they charge that there are a number of other creditors of said "hardware company" not herein named, and whose names or the amount of their respective claims plaintiffs are unable to state, but who, whenever known, will be recognized by plaintiffs as creditors and entitled to share in the ratable distribution of the assets of said "hardware company" if they come in under the terms and condition of the law.

Plaintiffs further state that the said "hardware company" was on the 9th day of November, 1889, and now is totally insolvent and unable to pay its debts, and that it made the conveyances aforesaid to said trustee for the purpose and with the intent to cease to carry on its business for which it was created or any other legitimate business, and that it did then so cease to be "a going concern" and has not since done any business other than that done by said trustee in disposing of its assets and winding up its affairs; that on and before the 9th day of November, 1889, the members, stockholders, officers, and promoters of said "hardware company" corporation knew that said corporation was insolvent, and that its available assets were inadequate to pay its debts, and they also knew of such insolvency at and before it preferred the debts which it preferred in said chattel mortgages or deeds of trust.

Plaintiffs further state that said trustee refuses to pay or recognize any claim or debt against said "hardware company," except said preferred claims, until after the latter are all paid, and they have not yet been paid, and said trustee claims that the entire assets in his hands will not pay any debt except a portion of said preferred claims, and he refuses to recognize plaintiffs' claims as being entitled to an equal or to any share in the distribution of said assets, and he and all the other defendants insist on the right to pay off said preferred claims out of said assets so far as they will reach to the exclusion of all other debts, and if the terms and provisions of said chattel mortgages or deeds of trust are carried out none of

these plaintiffs nor any non-preferred creditor will receive anything on their respective debts.

Plaintiffs further state that they are informed and believe and charge that the members of said "hardware company" owned on the 9th day of November, 1889, a large amount of unpaid stock in said "hardware company," the amount whereof they cannot now state.

Plaintiffs further state that they are and each of them is a just creditor of said "hardware company" for goods, wares, and merchandise sold and delivered by them and each of them to said "hardware company," much of which goods was on hand when said trustee took possession of the assets of said "hardware company," and with the proceeds of which dedendants are seeking the payment of said preferred debts, to the exclusion of all others, and they charge that the just non-preferred debts of said "hardware company" amount to $40,000.00 or more, and of which no mention is made in either of said conveyances to said trustee, and they say that if said preferred debts be paid out of the assets of said "hardware company" the members, officers, and stockholders thereof will be relieved from individual liability on said preferred debts, either as surety, indorsers, or guarantors, to the detriment of the non-preferred creditors and in fraud of their rights.

Plaintiffs further state that this suit is brought for the benefit and equality of all the creditors of said "hardware company," and to secure a ratable distribution of its assets according to equity, and to prevent fraudulent, illegal, and unjust preferences to its members and others, and they say that the assets of said "hardware company" are a trust fund for the benefit of its creditors ratably, and no right exists to divert said assets or the proceeds thereof from that equitable purpose.

Plaintiffs further state and allege that the defendant L. P. Harrison, trustee named in the aforesaid chattel mortgages and deeds of trust, took possession of all the property and assets of said "hardware company" tortiously and without authority of law, and all his dealings, transactions, and sales or other disposition of said trust property were and are illegal and void; that he has sold and otherwise disposed of all said personal property, so that it is placed beyond the reach of these plaintiffs and of all the creditors of said "hardware company," except by the due process of law herein invoked, and the said L. P. Harrison wasted, mismanaged, and squandered said assets and now claims that from the entire personal assets he realized only about the sum of $55,000.00, and plaintiffs allege and charge that the said personal assets which went into the hands of L P. Harrison were worth $70,000, and that the real estate was worth about $5,000, and that he sold said real estate for a small sum and purchased it himself, all of which sales were made without authority of law and to the detriment of the non-preferred creditors.

Plaintiffs further state that the defendant L. P. Harrison commenced to sell the property and assets of said "hardware company" on or about the 29th day of November, 1889, at private sale by both retail and wholesale, and so continued to dispose of said property

until about the 26th day of March, 1890, at which latter date he sold all that remained of the stock of hardware and other goods, wares, and merchandise in bulk at public auction, and the same was knocked off and sold to T. D. Craig, who is a brother-in-law of the said L. P. Harrison, when at the time of said sale the said T. D. Craig was absent from the State of Texas; that said property was sold at auction for $10,000 in bulk, and at the time of the sale a large portion of said goods was securely boxed up, so that outside parties who desired to bid and would have bid on them could they have been seen would not and did not bid on them and would have given much more than 10,000 for them had they known the amount, character, and quality of the goods about to be sold; and the said L. P. Harrison failed to furnish an invoice of said goods to any one at said sale or prior thereto showing the stock he proposed to sell, or to in any way enable bidders to approximately determine the value of the property offered for sale, all of which was done and participated in by the said L. P. Harrison for the purpose of preventing said property from bringing its value and of stifling competition at said sale, and it had the effect to prevent others from bidding, and plaintiffs charge and say that the property sold at said auction sale and which was bid in for T. D. Craig was at the time worth $25,000.

Plaintiffs further state that shortly after said property was bid in for the said T. D. Craig and while the said Craig was absent from the State of Texas the said L. P. Harrison sold the said goods so bid in by the said T. D. Craig for about $25,000.00, and the plaintiffs believe and charge that the said L. P. Harrison was an interested party in the purchase and sale of said goods bought in for said T. D. Craig, and that he was interested in and shared the profits derived from said purchase and sale.

Plaintiffs further state that the plaintiffs, The Perry Stove Mfg. Co., Schoverling, Daly & Gales, The Reading Hardware Co., J. Rosenblatt & Co., and The Ansonia Clock Co., for themselves and other creditors of said "hardware company," and on the 20th day of November, 1889, filed in vacation the original creditors' bill against said "hardware company" and L. P. Harrison, trustee, and prayed for the appointment of a receiver of all the effects and assets of said "hardware company;" to which bill all the other parties defendant and intervenors herein voluntarily made themselves parties except the Paris Exchange Bank, which has since been made a defendant and duly cited by the plaintiffs; that at chambers on the 29th day of November, 1889, your honor, on the hearing of the application for a receiver, refused to appoint one, but directed the trust to be executed by the said L. P. Harrison, trustee, under the direction of the court, and that he give bond for the faithful discharge of his duties as such trustee in the sum of $85,000.00, all of which was prior to the time said L. P. Harrison disposed of any of said property, which bond he did give.

Plaintiffs further state that each and all of said chattel mortgages or deeds of trust were and are fraudulent, without authority of law, for the reasons hereinbefore stated, and all the acts and proceedings

of said trustee made, had, and done under and by virtue thereof, or based thereon, or in pursuance thereof, or of the order of the court or judge aforesaid at chambers are without authority of law and afford no protection to the said L. P. Harrison.

Plaintiffs further charge and state that they are informed and believe that only a few days prior to the 9th day of November, 1889, the said L. P. Harrison was a member of the said "hardware company," and that he was the owner and possessed of unpaid stock therein, the amount whereof plaintiffs do not know; that only a day or two prior to said 9th day of November, 1889, for the purpose of and with the intent to avoid individual liability thereon, and with a full knowledge that said "hardware company" was insolvent, unable to pay its debts, and that it then intended to fraudulently transfer all its assets to him, as trustee, to pay the above-mentioned preferred creditors, including himself, transferred and delivered said unpaid stock to Joe Lyons, without consideration from said Lyons, who was at the time and now is totally insolvent, well knowing at the time that said Joe Lyons was wholly insolvent.

Plaintiffs further state that they are not sufficiently informed as to whether the said L. P. Harrison has or has not paid off any of said preferred claims or any part thereof to allege that he has or has not done so, but they allege that if any payment has been made by him out of the assets of said "hardware company" to any preferred creditor or creditors or to any other person, the creditor or other person who received it did so with a full knowledge of the pendency of this creditors' bill, and that no such payment or payments were made, if at all, until subsequent to the 29th day of November, 1889, and was paid to a person or persons then defendant, defendants, intervenor, or intervenors in this bill.

Plaintiffs further state that the defendant L. P. Harrison has not accounted for or paid over to the creditors of the said "hardware company" the assets that went into his hands, but that he wasted, squandered, and mismanaged said assets and the proceeds thereof, and they pray the court for judgment against the said L. P. Harrison for such amount as they may show is the difference between the value of the assets disposed of by him and the amount he proposes to account for, if any, on the trial of this cause; and they also pray that the Farmers' & Merchants' bank and the Paris Exchange bank be required to bring into court all money, if any, paid to them or either of them by the said L. P. Harrison on their respective debts against the said "hardware company," and they also pray that on the hearing of this cause said deeds of trust or mortgages be cancelled, set aside, and held for naught, and that all preferences in said instruments be set aside, and that all the assets of every kind of said "hardware company" be adjudged a trust fund, and that it be distributed ratably, together with such judgment as may be obtained against the said L. P. Harrison individually, among such creditors as may show themselves entitled to a distributive share thereof; and they pray for a judgment against L. P. Harrison for the amount of his unpaid stock in said "hardware company" owned by him or transferred by him on

on the eve of the insolvency of said hardware Co. or after, or in view of insolvency, and for all waste and mismanagement of said corporate assets in his hands as may be shown by the evidence, and that the entire amount of the recovery which may be had in this case be distributed ratably among such creditors of said "hardware company" as may show themselves entitled thereto under the law, and that equity be done in the premises; and they pray for costs and for all the relief to which they are entitled, legal or equitable, general or special.

HALE & HALE &
T. S. HILL,
Att'ys for Pl'ffs.

V. W. Hale, one of the attorneys for the plaintiffs in the above-entitled cause, being duly sworn, says that the facts stated in the above and foregoing petition stated of his own knowledge are true, and those stated from information he believes to be true.

V. W. HALE.

Sworn to and subscribed before me by V. W. Hale this March 30, 1891.

[SEAL.] G. W. MARTIN,
Clerk Dist. Ct., Lamar Co., Tex.

("EXHIBIT A.")

The following-named persons and corporations are creditors of the said "hardware company" and have judgments in the district court of Lamar county, Texas, for their respective debts:

Schoverling, Daly & Gales..... with interest at 8% from the 15th day of May, 1890.	$875 39
Merchant & Co..... with 8 per cent. interest from May 15th, 1890.	1,167 63
Potter Co-operative Co. for..... with same interest from same date.	1,592 83
The Perry Stove Mfg. Co..... interest at same rate from same date.	952 80
The Favorite Stove and Range Co..... interest same rate from same date.	958 14
The Joseph Hafner Mfg. Co..... interest at same rate from same date.	942 88
The Miami stove works..... interest same date at same rate.	710 21
The Reading Hardware Co..... interest same date at same rate.	1,128 01
Peter Wright & Sons..... interest at same rate from same date.	720 48
B. Kittridge Arms Co..... same date and rate of interest.	1,199 50
Junction Iron Co..... same date and rate of interest.	628 55

The Alaska Refrigerator Co..... same date and rate of interest.	$1,222 66
P. Wilson Sons & Co..... same date and rate of interest.	980 15
Alfred Field & Co..... same date and rate of interest.	1,678 85
The Ansonia Clock Co..... same date and rate of interest.	983 37
Knowles, Taylor & Knowles..... same date and rate of interest.	591 48
The St. Louis Shovel Co..... interest at same rate from Nov. 1st, 1890.	1,174 50
Koeller & Schmitz..... interest at same rate from Nov. 1st, 1890.	2,900 00
Griswold Bros..... same rate of interest from Nov. 1st, 1890.	918 23
Superior Barbed Wire Co..... with 8 per cent. interest from May 1st, 1889.	1,415 02
Superior Barbed Wire Co..... with interest from July 1st, 1889.	952 96
The Henry Sears Co..... with 8 per cent. interest from Nov. 11th, 1890.	1,848 08
Phillips Burtoff Mfg. Co..... interest from Nov. 15th, 1890, at 8 per cent.	1,876 00
Manning, Bowman & Co..... same interest from Nov. 15th, 1890.	1,802 10
The Racine Hardware Co..... with 8 per cent. interest from Nov. 15th, 1890.	2,192 63
The Meriden Cutlery Co..... with interest.	2,130 58
Peck, Stow & Wilcox..... with interest.	1,717 22
L. Waterberry & Co..... with interest.	2,008 49
The Baker Wire Co..... with interest.	1,956 94
Edward Miller & Co..... with interest.	1,297 57
Wilcox Silver Plate Co..... with interest.	1,120 23
Hubbard & Co..... with interest.	687 50
Adolph Kastor & Bros..... with interest.	610 10
The Ferris Hame Co..... with interest.	1,150 00
The Paint bottle works..... with 8 per cent. interest from Nov. 10th, 1890.	724 39
	$44,815 47

The following-named parties are preferred in said instrument for the amounts set opposite their names respectively, and they are in addition to the amounts hereinbefore named and exclusive thereof:

The Farmers' & Merchants' bank, Paris, Texas	$41,646 02
10 per cent. attorneys' fees thereon	4,164 00
The Paris Exchange bank	6,704 10
10 per cent. attorneys' fees thereon	670 41
L. P. Harrison	1,550 00
Laughlin Nail Co	485 75
Curtis Bros. & Co	1,177 22
Sergeant & Co	1,667 50
M. W. Rogers Mfg Co	2,169 69
	$60,234 67

("EXHIBIT B.")

The following-named persons and corporations are creditors of the said "hardware company" and have judgments in the county court of Lamar county, Texas, for their respective debts:

J. H. Baum	$414 37
rendered June 4th, 1890, drawing 8 per cent. interest.	
Haynes Carriage Company	353 05
dated March 5th, 1890, at 8 per cent. interest.	
J. Rosenblatt & Co	334 82
dated March 5th, 1890, with 8 per cent. interest.	
The Central Stamping Co	488 06
dated March 5th, 1890, drawing 8 per cent. interest.	
The Bristol Brass Clock Co	343 82
with interest at 8 per cent. from Sept. 4th, 1890.	
The Central Stamping Co	488 16
with 8 per cent. interest from March 5th, 1890.	
The Consolidated Mfg Co	399 00
The Quincy Showcase Co	311 00
the first drawing 8 per cent interest from March 6th, 1891, and the second from June 13th, 1890.	
Hogan, Evans & Co	494 00
8 per cent. interest from — day of ——, 1890.	
F. Myres & Co	952 20
8 per cent. interest from June 4th, 1890.	
The Brumwell Brush Wire Goods Co	325 17
with 8 per cent. interest from June 4th, 1890.	
R. Wallace & Sons	410 86
8 per cent. interest from Sept. 3rd, 1890.	
Simpson, Hall, Miller & Co	750 50
8 per cent. interest from Sept. 3rd, 1890.	
	$6,065 01

("EXHIBIT C.")

The following are creditors of the said "hardware company," and have judgments in the justice's court of precinct No. 1, in Lamar county, Texas, for their respective debts:

J. Patterson & Son..... dated March 31st, 1890.	$81 24
The Bronson Supply Co..... date March 5th, 1890, with 8 per cent. interest.	89 20
J. Leopold & Co..... 8 per cent. interest from March 30th, 1891.	192 49
The Manhatten Silver Plate Co..... 8 per cent. interest from — day of ——, 1890.	200 00
J. R. Torry & Co..... 8 per cent. interest from Feb. 24, 1890.	167 30
Stephens & Co..... 8 per cent. interest from Feb. 24, 1890.	133 40
	$862 63

("EXHIBIT D.")

The following-named persons and corporations, who are named in said mortgages or deeds of trust as preferred creditors, have not sued on their respective claims, nor are they in judgments, but who rely on the preference attempted to be given them in said mortgages or deeds of trust (to wit):

The Farmers' & Merchants' bank, the Paris Exchange bank, L. P. Harrison, the Laughlin Nail Company, Curtis Bros. & Company, Sargeant & Company, W. M. Rodgers Mfg. Company.

Indorsed: No. 4691. Perry Stove Mfg. Co. *et al.*, plaintiff-, *vs.* Lyons-Thomas Hardware Co. *et al.*, defendant-. 2nd amended original petition. Filed this 30 day of March, A. D. 1891. G. W. Martin, clerk of dist. ct., Lamar Co., Tex.

(Record, p. 35.)

Defendant Harrison's 1st Supplemental Answer.

In the District Court of Lamar County, Texas.

THE PERRY STOVE MANUFACTURING CO.
vs.
THE LYONS-THOMAS HARDWARE COMPANY. } No. 4691.

And now comes the defendant L. P. Harrison, as trustee, and by leave of the court files this his 1st supplemental answer herein in reply to plaintiffs' 2nd amended original petition, and adopts the demurrer and special exceptions herein filed by defendant, by

W. T. Gunn and others, on April 7th, 1891, and prays judgment of the court.

MAXEY, LIGHTFOOT & DENTON,
Attorneys for Defendant.

And by way of reply to said 2nd amended original petition of plaintiffs defendant L. P. Harrison denies all the allegations therein not herein admitted, and avers that since the filing of the original answer herein that on or about the 29th day of November, 1889, this cause was heard before the Hon. E. D. McClellan, judge of the district court in and for Lamar county, Texas, upon the petition herein filed by plaintiffs for an injunction and appointment of a receiver, and upon the several answers and pleas of intervention herein filed, and that said court, having full jurisdiction of the parties and the subject-matter, did, on or about said Nov. 29th, 1889, render its judgment and decree, refusing to appoint a receiver upon the application of said parties and appointing the defendant as trustee in the nature of a receiver to execute said several trusts described, as set out in his original answer; that said decree was duly signed by said judge and enrolled upon the minutes of said court, and has ever since been fully approved, acted upon, and acquiesced in by said court and all the parties to this suit, and no effort has ever been made to vacate the same, but the same is now still in full force and effect, and that this defendant did qualify under said order and decree and did carry out and fully perform said trusts in every respect and has made his reports and filed his accounts in this cause as therein required; to which reference is here made.

That this defendant sold all of said property in compliance with the terms of said deeds of trust and chattel mortgages and with said decree, as is fully shown by said accounts herein filed, and applied the proceeds to the payment of said secured debts according to their several priorities, tenor, and effect, as directed by said decree, as far as such assets would go, and that the proceeds were not sufficient to pay off and satisfy said first secured claims, as fully shown by said accounts herein filed.

That said judgment and decree is now in full force and effect, and said proceeds of such sales have been paid out in accordance therewith.

Wherefore this defendant prays that his said action and his said accounts and vouchers be approved by the court, and that he go hence without day with his costs, and for general relief.

MAXEY, LIGHTFOOT & DENTON,
Attorneys for Defendant L. P. Harrison, Trustee.

Indorsed: No. 4691. The Perry Stove Manufacturing Co., plaintiffs, *vs.* The Lyons-Thomas Hardware Co., defendant. Defendant Harrison's 1st supplemental answer. Filed this 8 day of April, A. D. 1891. G. W. Martin, clerk of the district court of Lamar county, Texas.

(Record, p. 37.)

Plea of Intervention.

In District Court, Lamar County, Texas.

THE PERRY STOVE MANUFACTURING CO. *et al.*
vs.
THE LYONS-THOMAS HARDWARE CO. *et al.*

To the Hon. E. D. McClellan, judge of the 6th judicial district of the State of Texas:

And come W. T. Gunn, T. J. Record, Jno. C. Gibbons, N. H. Ragland, C. I. Broad, J. D. Thomas, and L. P. Harrison and move the court to hear them on the application for the appointment of a receiver herein and to allow them to file this their plea of intervention in the above entitled and numbered cause, and they show to your honor that all of the above named intervenors are resident citizens of Lamar county, Texas, and that they and each of them are interested in the subject-matter of this suit, as will more fully hereinafter be shown.

That said intervenors and each of them are sureties or accom-odation endorsers for The Lyons-Thomas Hardware Co., defendant, and were such sureties and accom-odation endorsers on the 9th day of November, A. D. 1889, and long prior thereto as follows, to wit: W. T. Gunn was surety for said hardware Co. to the Paris Exchange bank on a note for the sum of $3,333.35. T. J. Record was surety for said hardware Co. on two notes to the Paris Exchange bank, one for $3,333.35 & one for $3,370.75. Jno. C. Gibbons was surety for said hardware Co. to the Paris Exchange — on a note for the sum of $3,333.35. N. H. Ragland was an accom-odation endorser of said hardware Co.'s note to the Farmers' & Merchants' Bank of Paris, Texas, for the sum of $13,308.60, and was surety on said hardware Co.'s two other promissory notes to said bank, one for the sum of $10,750.00 and the other for the sum of $11,072.50. C. I. Broad was accom-odation endorser of said hardware Co.'s note to the Farmers' & Merchants' Bank of Paris, Texas, for the sum of $13,308.60, and was surety on three (3) other promissory notes of said hardware Co.'s, two of which were to the said Farmers' & Merchants' bank and for the aggregate sum of $21,822.50, and the other to the Paris Exchange bank and for the sum of $3,370.75. J. D. Thomas was surety for said hardware Co. to the said Farmers' & Merchants' bank on a note for the sum of $13,308.60. L. P. Harrison was surety for said hardware Co. to the said Farmers' & Merchants' bank on two notes, one for $13,308.60 and one for $10,750.00. The total amount of said hardware Co.'s notes for which these intervenors were security or accom-odation endorsers amounted to the sum of $41,836.00.

Intervenors would further show to the court that each, every, and all of the above-enumerated debts were on the said 9th day of November, A. D. 1889, and long prior thereto and are now *bona fide* and

subsisting debts of the said Lyons-Thomas Hardware Co. and are due and owing by the said hardware Co. to the said Farmers' & Merchants' bank and the said Paris Exchange bank, and that the consideration of said notes or debts was cash money loaned by said banks to said hardware Co. to enable it to carry on and continue its said corporate business of trading in hardware, &c., and that all and every dollar of said money was so used and appropriated by said hardware Co., and that intervenors are and were on the said 9th day of November, 1889, and long prior thereto sureties and accom--odation endorsers on the said notes of the said Lyons-Thomas Hardware Co. to the said banks for the said amounts, and that intervenors are not now and were not at the date of the execution of the chattel mortgage, as hereinafter alleged, members of or stockholders in said hardware company.

Intervenors say that to secure the payment of the above-enumerated debts and to save intervenors harmless from any liability on the same and as an indemnity to them as such sureties and accom--odation endorsers of the said hardware Co., the said hardware Co. did, on the said 9th day of November, 1889, execute and deliver to intervenor L. P. Harrison, as trustee, the first-mentioned chattel mortgage in plaintiffs' petition referred to (a copy of which is attached to defendants' answer and reference to which is hereby made), and immediately after the execution and delivery of said chattel mortgage and on the said 9th day of Nov., 1889, said trustee filed with and deposited said chattel mortgage in the office of the county clerk of Lamar county, Texas, and on the said 9th day of November, 1889, the said Lyons-Thomas Hardware Co. surrendered and turned over to the said L. P. Harrison, who took charge and possession of all the goods, wares, merchandise, and property mentioned and described in said chattel mortgage and held the same as a pledge for the benefit of all of intervenors, and was in good faith proceeding to carry out the terms and provisions of said mortgage and pledge for the benefit of the intervenors till interfered with by your honor's temporary restraining order issued herein on the 20th day of November, A. D. 1889. Intervenors and each of them deny that in the execution of said mortgage or in the turning over of said property as a pledge to intervenors that there was any intention to defraud, delay, or hinder the creditors of the said Lyons-Thomas Hardware Co. in the collection of their debts, or if there was any such fraudulent intention on the part of said hardware Co. it was wholly unknown to these intervenors or to any or either of them, and they and each of them allege that the said mortgage was executed and delivered and the said property turned over as aforesaid to these intervenors in good faith and for the sole purpose of protecting and saving harmless these intervenors as sureties and accom-odation indorsers of said hardware Co. on the aforesaid notes. Intervenors allege that they and each of them are solvent; that the amount of the said notes for which they are sureties and accom-odation endorsers for the said Lyons-Thomas Hardware Co. is less than the amount of the capital stock of said hardware Co., and the said hardware Co. had the power under its charter to borrow said money, to

execute said notes therefor, and to secure the same by mortgage or pledge of its property.

Intervenors and each of them say that there is no necessity for the appointment of a receiver in this cause, but allege that the appointment of a receiver will be attended by much additional expense and will materially diminish or lessen the amount realized from the sale of said property and the fund out of which the debts hereinbefore mentioned and for which these intervenors are liable as sureties and accom-odation endorsers as aforesaid are to be paid.

Wherefore, premises considered, these intervenors pray that your honor will not appoint a receiver herein, but that you will permit the said L. P. Harrison, as trustee for the benefit of all of intervenors, to go on and carry out the provisions of said chattel mortgage and pledge and to fully administer said trust according to the terms and provisions of said mortgage, or if your honor should conclude that it would be to the interest of all parties concerned that said trust should be administered under the direction and control of the court, then these intervenors pray that said trustee be permitted to administer and carry out the same, and the said intervenor, L. P. Harrison, now here offers to give bond in any sum your honor may deem sufficient for the faithful discharge and performance of his duties, and he prays that he be allowed and required to make his final settlement to this court of his management and administration of said trust. Intervenors pray for costs and for general and special relief, both legal and equitable.

DUDLEY & MOORE,
Att'ys for Intervenors.

THE STATE OF TEXAS, }
Lamar County. }

Before me, the undersigned authority, on this day personally appeared L. P. Harrison, N. H. Ragland, C. I. Broad, J. C. Gibbons, T. J. Record, W. T. Gunn, & J. D. Thomas, intervenors in the above and foregoing plea, who, being by me first duly sworn, each upon oath severally says that the allegations and statements in the above and foregoing plea of intervention are true.

L. P. HARRISON.
N. H. RAGLAND.
C. I. BROAD.
J. C. GIBBONS.
T. J. RECORD.
W. T. GUNN.
J. D. THOMAS.

Sworn to and subscribed before me this the 28th day of November, 1889.

[SEAL.]

P. W. HARRISON,
Notary Public, Lamar County, Texas.

Indorsed: No. 4691. Perry Stove Manufacturing Co. *et al. vs.* Lyons-Thomas Hardware Co. *et al.* Plea of intervention. Filed November 29th, 1889. W. R. Wood, clerk dist. ct., Lamar Co., Tex.

(Record, p. 41.)

Answer of Defendants, Except Baker Wire Co.

In District Court, Lamar Co., Tex.

THE PERRY STOVE MFG. CO.
vs.
LYONS-THOMAS HARDWARE COMPANY *et al.* } No. 4691.

And now come defendants and demur to plaintiffs' petition filed herein and to all the applications filed herein because the same is not sufficient in law to entitle plaintiffs to the relief prayed for or to any relief; and of this they pray judgment of the court.

MAXEY, LIGHTFOOT & DENTON,
Att'ys for Def'ts, Except Baker Wire Co.

And if required to answer herein these defendants deny all and singular the allegations in plaintiffs' petition not herein specially admitted, and for special answer these defendants say that the names and residences of pl'ffs are correctly stated as far as these def'ts know, and that the amounts of plaintiffs' claims against the Lyons-Thomas Hardware Company these def'ts believe to be correct, and it is true that said Lyons-Thomas Hardware Company was on Nov. 9th, 1889, indebted to other parties, many of which said debts are still unpaid. Defendants also aver that it is true that on Nov. 9th, 1889, or thereabout, the said Lyons-Thomas Hardware Company, under the advice and by the consent and direction of its stockholders and directors, did make, execute, and deliver to the said L. P. Harrison as trustee a certain chattel mortgage upon all of its stock of goods, wares, and merchandise and other personal property in the city of Paris as security for certain debts named therein, to wit:

1st. An overdrawn account at the Farmers' & Merchants' bank for the sum of $6,514.85 or thereabouts.

2nd. A certain note of said Lyons-Thomas Hardware Company to said bank for the sum of $13,308.60, dated April 26th, 1889, and due Dec. 1st, 1889, with interest at one per cent. per month from maturity and ten per cent. attorney's fees if collected by law or placed for collection, with Joe Lyons, Julius P. Record, L. P. Harrison, J. D. Thomas as sureties and C. I. Broad and N. H. Ragland as endorsers.

3rd. A certain other note of said Lyons-Thomas Hardware Company to said bank for $10,750, dated April 26, '89, due Dec. 15th, 1889, with Joe Lyons, Julius P. Record, L. P. Harrison, N. H. Ragland, and C. I. Broad as sureties, with interest at one per cent. per month from maturity and ten per cent. attorney's fees if collected by law or placed for collection.

4th. A certain other note of said Lyons-Thomas Hardware Company to said bank for $11,072.50, dated April 26th, 1889, due Dec. 31st, 1889, with interest at one per cent. per month from maturity

& ten per cent. attorney's fees if collected by law or placed for collection.

5th. A certain note of the Lyons-Thomas Hardware Company to the Paris Exchange bank, dated M'ch 1st, 1889, due July 1st, 1890, for $3,333.35, with certain sureties thereon, and

6th. A certain note of said Lyons-Thomas Hardware Company to the Paris Exchange bank for $3,370.75, dated M'ch 1st, 1889, and due Feb. 1st, 1890, with certain sureties thereon.

A copy of said chattel mortage is filed in this cause cotemporaneous herewith and attached to the plea of intervention of said Farmers' & Merchants' bank, marked "Exhibit A," and is here referred to and made a part of this answer, and reference is made thereto for a more perfect description of said debts and of said property embraced therein. These defendants aver that said chattel mortgage was executed by said Lyons-Thomas Hardware Company in good faith to secure the said debts, which were created for the sole use and benefit of said Lyons-Thomas Hardware Company in the due course of its business, and that such security was accepted by the *cestui que trust.* therein named, and the said L. P. Harrison as such trustee accepted said trust, and after the execution of the same said Lyons-Thomas Hardware Company had left a large amount of real estate, to wit, two storehouses in Paris, Texas, worth more than the sum of $10,000 and other real estate, and that said trustee in good faith agreed to execute the same, and that he immediately took possession of all of said property and filed said chattel mortgage in the office of the clerk of the county court in and for Lamar county, Texas, for registration, and that the same was received and filed by said clerk at 5.20 o'clock p. m. on said Nov. 9th, 1889, and said chattel mortgage duly & legally registered as required by law; that afterwards, to wit, on the 9th day of Nov., 1889, or thereabout the said Lyons-Thomas Hardware Company executed unto the said L. P. Harrison, as trustee, a certain deed of trust upon certain real estate situate in Lamar county, Texas, to secure certain other debts, all of which said debts and said real estate are fully described in said deed of trust, which is duly recorded in Lamar county registry of trusts and mortgages, Book 6, pages 403, 404, 405, & 406, and said original is hereto attached and made a part hereof, marked "Exhibit B," which said deed of trust was duly & legally filed for record at 6 o'clock p. m. on said Nov. 9th, 1889; that afterwards, to wit, on said 9th day of Nov., 1889, the said Lyons-Thomas Hardware Company in order to secure certain other debts did make, execute, and deliver to said L. P. Harrison, as trustee, a chattel mortgage & deed of trust upon all of said personal & real property, and placed said trustee in possession of the same, & that he accepted said trusts and agreed to execute and perform the same. A certified copy of said last-made chattel mortgage & deed of trust is hereto attached and made a part hereof, marked "Exhibit C," and reference is here made to the same for a full description of said debts and said property. These defendants aver that all of said debts above mentioned were created by said Lyons-Thomas Hardware Company in the due course of its business and said Lyons-Thomas

Hardware Company received the full benefit of the same and executed chattel mortgages and deeds of trusts in good faith to secure the same under the advice and consent and by the direction of its stockholders and directors. These defendants aver that after the execution of said instrument the said L. P. Harrison, as such trustee, took possession of all of said property, and that he was on or about the 12th day of Nov., 1889, served with a writ of garnishment for the sum of about $526.00, at the suit of Fairbanks & Co. *vs.* Lyons-Thomas Hardware Company for any balance that might remain in his hands after satisfying said second debts, said suit being filed in the county court of Lamar county, Texas.

Defendants further aver that afterwards, to wit, on or about the 12th day of Nov., 1889, suit was brought by def't Baker Wire Company against said Lyons-Thomas Hardware Company & L. P. Harrison, trustee, in the district court of Lamar county, Texas, to recover out of said property a large amount of wire & staples, and that such proceedings were had therein that said Baker Wire Company sued out its writ of sequestration and caused the same to be levied upon a large amount of said wire and staples valued by the sheriff at the sum of about $1,712.00; which said property was replevied by defendant L. P. Harrison and his replevy bond executed and filed in said case for the sum of $3,500, which was approved by such officer and said property released to said trustee, who now has possession of all of said property; that now is the best time to sell said property, and every day lost in such sales is of great value.

That most of the insurance companies holding policies on said property have allowed the same to be transferred to said trustee, & that he now holds in such policies insurance upon said property to the amount of about $45,000, and that it is important that said property shall be sold by him as soon as practicable; that it is true that said trustee, in compliance with the terms of said chattel mortgages or deeds of trust, did advertise said property for sale, such sale to begin on or about the 23rd day of Nov., 1889, and that he desisted from such sale in obedience to the order of your honor made in this cause; that it is true there are other creditors than those named in said securities. These defendants deny that said Lyons-Thomas Hardware Company was insolvent at the time of the execution of said above-described instruments, but they aver that they are informed and believe and charge the fact to be that if all of their assets were applied at a fair and reasonable value to the payment of their debts, that the same could be fully satisfied out of such assets. These defendants admit that they insist upon the debts secured in said mortgage being paid and settled according to the terms of said securities, and that they deny the rights of plaintiffs to share in such securities equally with the debts therein secured, and that such trustee is proposing to sell said property in accordance with said securities and to apply the proceeds of such sales as therein provided, which he is ready and willing to do. These defendants deny that the members of said Lyons-Thomas Hardware Company owe any unpaid stock, but they aver the fact

to be that all the stock of said company has long since been fully paid up. Defendants further aver that it is true that there are some other debts outstanding besides the claims of plaintiffs, no part of which are secured in said chattel mortgages or deeds of trust, but def'ts deny that they are without remedy at law, and defendants who are members of said Lyons-Thomas Hardware Company aver that they are willing and anxious to settle and pay all of their just debts as soon as practicable, and said defendants each and all deny that any individual debts of any of the stockholders or officers of said Lyons-Thomas Hardware Company were secured in said chattel mortgages or deeds of trust, but they aver that each and every debt so secured was a debt of said company and was incurred for its own use and benefit, and not one dollar of such secured indebtedness was for the separate use or benefit of any such officer or stockholder. Defendants deny the right of plaintiffs to represent any creditor or creditors except themselves in this cause, and they deny the right of any such creditor to divert the security given by said Lyons-Thomas Hardware Company from the purposes set out in such securities. They aver that the order of your honor restraining temporarily the sale of said goods, wares, and merchandise is greatly to the detriment of said property, and that every day lost at the present season is very valuable; that plaintiffs are not lien creditors, and def'ts are informed and believe that they have no right to interfere or delay the said trustee in the execution of said trusts; that said trustee is amply solvent, and, if allowed to do so, will faithfully execute said trusts.

Wherefore def'ts pray that said temporary injunction be dissolved, and that the said trustee be allowed to sell said property in accordance with said trusts for costs and for general relief.

MAXEY, LIGHTFOOT & DENTON,
For Def'ts, Except the Baker Wire Co.

STATE OF TEXAS, }
Lamar County. }

Before me, the undersigned authority, on this day personally appeared def'ts L. P. Harrison & Joe Lyons, who each say on oath that the facts as set forth in the foregoing answer are true.

L. P. HARRISON.
JOE LYONS.

Sworn to and subscribed before me by the said L. P. Harrison and Joe Lyons on this the 23rd day of November, A. D. 1889.

[SEAL.] Witness my official signature and seal of office day and date above written.

W. R. WOOD,
Clerk District Court, Lamar County, Texas.

And for further answer to the application of the Baker Wire Company filed herein defendant L. P. Harrison demurs thereto, because the same shows upon its face that it is not sufficient in law, and of this he prays judgment of the court, and for special exception thereto this defendant says that the said pleading shows upon its face that

the said applicant has a full and adequate remedy at law and has taken said legal remedy and is now pursuing the same; wherefore this def't prays judgment of the court.

MAXEY, LIGHTFOOT & DENTON,
For Def'ts.

And for further answer and by way of cross-bill against said above-mentioned applicants and against plaintiffs and all parties in this case who are seeking the appointment of a receiver, this defendant says that he does not own any stock whatever in the Lyons-Thomas Hardware Company and did not own any of said stock at the time said mortgages and deeds of trust were executed, nor did he have or own any interest whatever in the said corporation or its capital stock or in any of its property, but he avers that he was then and still is a creditor of said concern, as set out in his foregoing joint answer, and that he was surety for said Lyons-Thomas Hardware Company for a large amount of money, and said chattel mortgages and deeds of trust were made to this defendant as trustee & accepted by him in good faith to secure said debts, & that at the time this defendant was placed in possession of said property as trustee for himself and the other *cestui que trust.* and still holds the same for the purpose of executing said trusts, as he has a perfect right to do; that this defendant is amply solvent and is fully competent to execute said trust, and that said plaintiffs and other parties who ask a receiver all have adequate remedies at law; that the *cestui que trust.* named in said mortgages and deeds of trust are all solvent, as this defendant is informed and believes, and that all those secured in the first-named chattel mortgage this defendant knows are solvent; that plaintiffs and all the creditors who are asking and seeking the appointment of a receiver herein have been and are still harassing this defendant with suits in the courts, as heretofore set out, and are claiming that said mortgages and deeds of trust confer no power upon this defendant to sell said property; that this defendant can sell said property at greatly less cost and expense under said mortgages & deeds of trust than the same could be sold for by a receiver, and that the appointment and expense of a receiver would greatly detract from the value of said securities. This defendant avers his willingness and here now offers to execute bond in any amount the court may fix to secure all parties concerned; and this defendant prays that the applications for a receiver be denied; that the temporary injunction be dissolved; that this defendant be allowed to enter into a fair and reasonable bond to be fixed by the court, and that for his own protection he be allowed to execute said trusts under the direction of the court, and for general relief.

MAXEY, LIGHTFOOT & DENTON,
For Def't L. P. Harrison.

Before me, the undersigned authority, on this day personally appeared L. P. Harrison, who says on oath that the facts set forth in the foregoing answer are true.

L. P. HARRISON.

Sworn to and subscribed before me on this the 29th day of November, A. D. 1889.

W. R. WOOD,
Clerk Dist. Ct., Lamar Co., Texas,
[SEAL.] By W. B. KAVANAUGH, *Deputy.*

THE STATE OF TEXAS, }
County of Lamar. }

Know all men by these presents that the Lyons-Thomas Hardware Company of Paris, of the county of Lamar and State of Texas, for and in consideration of five dollars to it in hand paid by L. P. Harrison, the receipt of which is hereby acknowledged, have granted, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said L. P. Harrison, as trustee herein, and to his successors in this trust and to his or their assigns the following-described land, situated in the county of Lamar and State of Texas and described as follows, to wit, within the corporate limits of the city of Paris, Texas, and more particularly described as follows: A part of lot No. one (1), in block No. twenty-three (23), as shown — the plat of the city of Paris, and more particularly described as follows: Beginning at a point 30 feet west of the N. E. cor. of lot No. (1) one, block twenty-three (23), thence west to a point 8 feet east of the N. E. cor. of lot No. 4, block twenty-three (23); thence south 100 feet to an alley; thence east along the north side of said alley 50 feet to the S. W. cor. of a lot heretofore owned by R. R. Cowan; thence north with his W. B. line 100 feet to the place of beginning.

2nd tract, a part of the Larkin-Rattan survey, in Paris, Lamar Co., Texas, and also a part of a tract heretofore deeded to S. M. Hamilton by M. E. Cothran on July 1, 1886, and more particularly described as follows: Beginning at a stake in North Main street or S. B. line of Redding Russell survey, thence south with east boundary line of North Main street to the N. B. line of the Gulf, Colorado & Santa Fé depot grounds; thence north 70° east with the N. B. line of said depot grounds to the S. B. line of said Redding Russell survey; thence west to the place of beginning:

To have and hold the above-described premises, together with all and singular the rights, members, improvements, hereditaments, and appurtenances thereto in anywise belonging, unto the said L. P. Harrison, as trustee herein, and to his successors in this trust and to his or their assigns forever in fee-simple; and said Lyons-Thomas Hardware Company hereby binds itself & successors to forever warrant and defend the right and title to the said premises unto the said L. P. Harrison, as trustee herein, and to his successors in this trust and to his or their assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

This conveyance, however, is intended as a trust for the purpose of better securing L. P. Harrison, of Lamar Co., Texas; Superior Wire Co., Laughlin Nail Co., & Curtis Bros. & Company in the payment of certain indebtedness described as follows:

1st. Three notes payable to L. P. Harrison, one for $1,000, dated

May 6, 1889, & due Nov. 1, 1889, with 12 per cent. interest after maturity; one for $250, dated M'ch 30, 1889, and due Oct. 1, 1889, with 12 per cent. interest from maturity; one note for $300, dated Oct. 9, 1889, & due Dec. 9, 1889, with 12 per cent. interest from date, and each of said notes has a clause providing for 10 per cent. att'y's fees if collected by law or placed for collection.

2nd. One note due the Superior Wire Company for $1,000, due Dec. 1, 1889, and signed by said Lyons-Thomas Hardware Company & L. P. Harrison & Joe Lyons as sureties on the same.

Third. Laughlin Nail Company, note dated Nov. 6, 1889, & due Dec. 6, 1889, for $485.75, with 10 % interest from maturity, & signed by the grantor herein & Joe Lyons & L. P. Harrison.

Fourth. Three notes signed by the grantor herein & payable to Curtis Bros. & Co., one for $350, dated Oct. 18th, 1889, and due Nov. 18, 1889; one for $350, dated Oct. 18, 1889, & due Dec. 18, 1889, and one for $477.25, dated Nov. 7, 1889, & due January 1, 1890.

Now, upon payment of said indebtedness, principal and interest, being well and truly made, then in such case this conveyance is to become null and void; but in case of failure or default in the payment of said indebtedness, principal and interest, at the maturity of the same, then the said L. P. Harrison, trustee herein, is by these presents fully authorized and empowered and it is made his special duty at the request of the said *of said* creditors or any one of them made at any time after the maturity of said indebtedness to sell the said above-described property at the court-house door, in Paris, in Lamar county, Texas, as under execution sales of real estate, to the highest bidder, at public outcry, for cash in hand, after giving public notice of said sale by posting a written notice of the time, terms, and place thereof at three public places in said Lamar county, Texas, one of which places shall be at the court-house door of said county at least twenty days prior to said day of sale, and after said sale as aforesaid the said L. P. Harrison, as trustee, is hereby authorized and empowered to make a good and sufficient deed in law to the property so sold, with the usual covenants and warrants, and to receive the proceeds of the sale and the same to apply to the payment of said indebtedness, with the interest thereon accrued, and said indebtedness shall be paid in full in the order above named, to wit, the notes due L. P. Harrison first, & so on, and the expenses of executing this trust, holding the remainder thereof subject to the order of the grantor herein; and it is hereby specially provided that should the — L. P. Harrison from any cause whatever fail or refuse to act or become disqualified from acting as such trustee, then the said creditors or a majority of them shall have full power to appoint a substitute in writing, who shall have the same powers as are hereby delegated to the said L. P. Harrison, and the grantor herein does by these presents fully and absolutely ratify and confirm any and all acts which the said L. P. Harrison or his substitute, as herein provided, may do in the premises by virtue of this instrument.

In testimony whereof the said Lyons-Thomas Hardware Company, by the instruction of its directors & stockholders, hath hereunto caused to be affixed the official signature of its president &

secretary under the seal of said corporation this November 9th, 1889.

The words on this page "as under execution sales of real estate" and the words on this page "& said indebtedness shall be paid in full in the order above named, to wit, the notes due L. P. Harrison first, & so on," were interlined before signing.

LYONS-THOMAS HARDWARE COMPANY,
By JOE LYONS, *President.*
[SEAL.] JULIUS P. RECORD, *Sec'y.*

THE STATE OF TEXAS, }
County of Lamar. }

Before me, B. J. Baldwin, Jr., notary public for Lamar county, Texas, on this day personally appeared Joe Lyons, president, & Julius P. Record, secretary, of the Lyons-Thomas Hardware Company, and who are known to me to be the persons whose names are subscribed to the foregoing instrument, and each acknowledged to me that they executed the same for the purposes and considerations therein expressed and in the capacities therein named.

Given under my hand and official seal of office this 9th day of Nov., A. D. 1889.

[SEAL.] B. J. BALDWIN, JR.,
Notary Public for Lamar County, Texas.

THE STATE OF TEXAS, }
County of Lamar. }

I, Sam. H. Hancock, clerk of the county court of said county, do hereby certify that the above and foregoing deed of trust dated the 9th day of November, A. D. 1889, with its certificate of acknowledgement and authentication thereof, was filed for record in my office on the 9 day of Nov., A. D. 1889, at 6 o'clock p. m., and the same was this day duly recorded, at 9 o'clock a. m., in the records of said county, in Book 6 of Trusts, &c., pages 403, '4, '5, & '6.

Witness my hand and seal of the county court of said county, at office, in Paris, this 11th day of Nov., A. D. 1889.

[SEAL.] SAM. H. HANCOCK,
Clerk County Court, Lamar County, Texas,
By D. RIDLEY, *Deputy.*

Indorsed: Lyons-Thomas Hardware Co. to L. P. Harrison, trustee. Deed of trust. Filed for record this the 9th day of November, 1889, at 6 o'clock p. m. Sam. H. Hancock, clerk Co. court, Lamar county, Texas.

EXHIBIT "C."

STATE OF TEXAS,
County of Lamar.

Know all men by these presents that the Lyons-Thomas Hardware Company, for and in consideration of the sum of one dollar to it in hand paid, the receipt of which is hereby acknowledged, and for the further considerations and trust hereinafter set forth & expressed, do hereby give, grant, bargain, sell, & convey and deliver unto L. P. Harrison, as trustee, all the following-described property, situated in Paris, Lamar county, Texas, to wit: All of our stock of goods, wares, and merchandise of whatsoever nature, kind, or description, situated and being in our storehouse and place of business on the west side of the public square in Paris, Texas, fronting on the said public square and also upon Grand avenue and running through the block to Short street, in the building belonging to John Gibbons and known as the Lyons-Thomas Hardware Company's store, said stock of goods, wares, and merchandise consisting of hardware, stoves, tinware, glassware, flasks, bottles, silver-plated ware, cutlery, brass goods, guns, pistols, ammunition, stationery, clocks, iron, nails, wagons, wagon bows, and thimbles, barbed wire, smoothe wire, ties, scales, builders' hardware, tin plate, farm supplies, queensware, toilet ware, chinaware, lamps and lamp fixtures, refrigerators, ice-cream freezers, water coolers, and everything whatsoever embraced in our said stock of goods, wares, & merchandise and situate in our said storehouse, together with one iron safe now in said building and the back platform attached to said building, and all fixtures, show-cases, stoves, counters, desks, shelving, and all furniture, tools, implements, and utensils, and all property of whatsoever kind, nature, or description situate in said storehouse; also all of our books, accounts, notes, choses in action, and evidences of debt appertaining to our said business and situate in said storehouse; also one new two-horse delivery wagon and one set of double harness with the same; also one old single-horse spring delivery wagon and one set of old single harness with the same; also one bay horse, about nine years old, named Doc.; also one gray mare, about eight years old, named "Nellie;" also one brown horse mule, about twelve years old, named "Jack;" also one double-seated two-horse surry now situate and being in west store-room on Grand avenue, in lot 1, block 23, in Paris, Texas; also a lot of goods, wares, and merchandise stored in a certain building belonging to and owned by J. G. Dudley, fronting on Grand avenue, in Paris, Texas, and known as the Dich Cowan storehouse, said goods, wares, and merchandise consisting of single-trees, whiffle-trees, double-trees, hames, barbed wire, wheels, boys' wagons, and other property, including all the goods, wares, & merchandise of whatever nature, kind, or description situate in said building and belonging to the stock of said Lyons-Thomas Hardware Company; also a lot of goods, wares, and merchandise situate and being in two storehouses owned by us, located on Grand avenue, being part of lot No. 1, in block No. 23, in said

city of Paris, fully described in a certain deed duly recorded in Lamar County Registry of Deeds Book vol. 61, page 489. Said goods, wares, and merchandise situate in said two buildings or storehouses so located consists of sash, doors, blinds, screens, transoms, screen doors, screen windows, and other builders' material, stoves, refrigerators, lawn-mowers, ties, barbed wire, smooth wire, coffee mills, scales, glass, glassware, lamps and lamp fixtures, goblets, rope, and all other goods, wares, and merchandise of whatsoever nature, kind, or description situated in said two storehouses last above mentioned; also a lot of goods, wares, & merchandise consisting of powder boxes, cans, planks, bottles, and other property situated in a certain building known as the Lyons-Thomas Hardware Company's magazine, situated upon a certain tract of land owned by us on North Main street, in the north part of the city of Paris, fully described in a certain deed recorded in Lamar County Registry of Deeds Book Z, volume 2, page 255, including all the personal property, goods, wares, and merchandise situate in said magazine building; also the following-described two tracts or parcels of land, and both situated within the corporate limits of the city of Paris, Lamar county, Texas, and the first tract is more particularly described, being part of lot No. one (1), in block twenty-three (23), as shown by the plat of the city of Paris, and beginning at a stake a point (50) fifty feet west of the N. E. corner of lot No. one (1), in block twenty-three (23), thence west to a point 8 feet east of the N. E. cor. of lot No. 4, block 23; thence south 100 feet to an alley; thence east along the north side of said alley 50 feet to the S. W. cor. of a lot heretofore owned by R. R. Cowan; thence north with his W. B. line 100 feet to the place of beginning.

The second tract is described as follows: A part of the Larkin-Rattan survey & beginning at a stake in North Main street on the S. B. line of the Redding Russell survey, thence south — the E. B. line of said street to the W. B. line of the Gulf, Colorado & Santa Fé Railroad's depot grounds; thence north 70° east with the N. B. line of said depot grounds to the S. B. line of the said Redding Russell survey; thence west to the place of beginning.

And all of said above-described property, real & personal, is hereby delivered & possession is hereby given to the said trustee, and he is fully authorized to take possession of the same, and such possession is hereby given him in trust for the following purposes and considerations, and this instrument is intended as a mortgage for the following purposes, subject, however, to a mortgage heretofore executed by the said Lyons-Thomas Hardware Company to L. P. Harrison, as trustee, on all of the personal property above described and set forth and also subject to a mortgage heretofore executed by said grantors herein to —— ——, as trustee, on all of the real estate above described to secure certain debts therein named; and whereas the said grantor herein is justly indebted unto the following-named parties in the several amounts hereinafter set forth as follows, to wit:

To Phillips & Burtoff Mfg. Co. in the sum of.....			$1,876 26
" Manning, Bowman & Co.	"	"	1,802 10
" Peck, Stowe & Wilcox	"	"	2,084 03
" S. Waterberry & Co.	"	"	2,008 49
" Sargeant & Co.	"	"	1,567 50
" Henry Sears & Sons	"	"	1,728 98
" Baker Wire Co.	"	"	1,956 94
" Meriden Cutlery Co.	"	"	2,130 58
" Superior Wire Co.	"	"	2,367 98
" Wm. Roger Mfg. Co.	"	"	2,169 60
" Koeller & Schmitz Cutlery Co. in the sum of.....			2,850 00
" Racine Hardware Co.	"	"	2,092 63

And whereas the said Lyons-Thomas Hardware Company is anxious & desirous to secure the above-described debts and have executed this mortgage for that purpose: Now, the said trustee shall take possession of all of said property, and the same is hereby delivered to him, & shall sell the same as soon as practicable either at public or private sale and in such quantities as will realize the largest amount of money, giving public notice for a reasonable length of time when he shall begin any such sale, & shall collect all of said notes, accounts, and other debts which can be collected, and may sell such as cannot be collected in six months, and shall apply the proceeds of such property and claims to the payment of the above-described debts *pro rata;* but it is expressly stipulated that if the said mortgagor shall at any time well and truly pay off & satisfy all of the above debts, then this mortgage shall be void & of no effect. It is further stipulated & agreed that if the said trustee shall fail or refuse to carry out the foregoing trust, then the said creditors or a majority of them may appoint a suitable trustee in his place, who shall fully execute the same as fully as if first appointed for that purpose. In testimony whereof the said Lyons-Thomas Hardware Company, by the instructions of its directors & stockholders, doth hereunto cause to be affixed the official signature of its president & secretary, under the seal of said corporation, on this 9th day of November, 1889.

LYONS-THOMAS HARDWARE COMPANY,
By JOE LYONS, *President.*
JULIUS P. RECORD, *Sec'y.*

Attest: R. D. LIGHTFOOT.
B. J. BALDWIN.

STATE OF TEXAS, }
County of Lamar. }

Before me, B. J. Baldwin, Jr., notary public for Lamar county, Texas, on this day personally appeared Joe Lyons, president, & Julius P. Record, secretary, of the Lyons-Thomas Hardware Company, & who are known to me to be the persons whose names are subscribed to the foregoing instrument of writing, and each acknowl-

edged to me that they executed the same for the purposes and considerations therein stated & expressed and in the capacity therein named.

[SEAL.] Given under my hand and seal of office, at Paris, Texas, on this 9th day of Nov., A. D. 1889.

B. J. BALDWIN, JR.,
Notary Public for Lamar Co., Texas.

I hereby accept the above and foregoing trust & agree to execute and perform the same, this Nov. 9th, 1889.

L. P. HARRISON.

Attest: BEN. H. DENTON.
D. RIDLEY.

Filed for record this 9th day of November, 1889, at 6 o'clock and 5 minutes p. m.

SAM. H. HANCOCK,
Clerk County Court, Lamar Co., Texas,
By D. RIDLEY, *Deputy.*

Received in my office and filed 9th day of November, 1889, at 6 o'clock and 5 minutes p. m.

SAM. H. HANCOCK,
Clerk County Court, Lamar County, Texas,
By D. RIDLEY, *Deputy.*

C. W. R. 5.
77 & 78.

STATE OF TEXAS, }
County of Lamar. }

I, Sam. H. Hancock, clerk county court, Lamar Co., do hereby certify that this and the foregoing six pages contain a true copy of the records of a deed of trust & chattel mortgage from the Lyons-Thomas Hardware Company to L. P. Harrison, trustee, as same appears of record and on file in my office and recorded in Deed Trust Record No. 6, page 406, & registered in Chattel Mortgage Record No. 5, pages 77 & 78, Lamar County records of trusts & chattels.

Given under my hand and seal of office, at Paris, this
[SEAL.] November 22, '89.

SAM. H. HANCOCK,
Clerk County Court, Lamar County, Texas.

Indorsed: No. 4691. The Perry Stove Mfg. Co. *vs.* Lyons-Thomas Hardware Company. Answer of def'ts, except Baker Wire Co. Filed November 29, 1889. W. R. Wood, clerk dist. ct., Lamar Co., Tex., by W. B. Kavanaugh, deputy.

(Record, p. 57.)

Plea of Intervention of the Farmers' & Merchants' Bank.

In District Court, Lamar County, Texas.

THE PERRY STOVE MFG. CO.
vs.
LYONS-THOMAS HARDWARE COMPANY *et al.* } No. 4691.

And now comes The Farmers' & Merchants' Bank, a private corporation duly and legally incorporated under and by virtue of the general laws of Texas and doing business at Paris, Texas, and by leave of the court files this its plea of intervention herein and would most respectfully make known to the court that intervenor is interested in the subject-matter of this suit, in this, that on or about the 26th day of April, 1889, The Lyons-Thomas Hardware Company, def't, being justly indebted unto said intervenor, did, on said last-named date or thereabout, make, execute, and deliver to intervenor its promissory note for the sum of $13,308.60, due and payable on Dec. 1st, 1889, with interest at the rate of one per cent. per month from maturity and ten per cent. attorney's fees if collected by law or placed for collection, with Joe Lyons, Julius Record, L. P. Harrison, and J. D. Thomas as sureties and C. I. Broad and N. H. Ragland as endorsers; that on or about the 26 day of April, 1889, the said Lyons-Thomas Hardware Company, being justly indebted to said intervenor in the further sum herein set out, did on said last-named date make, execute, and deliver unto intervenor its promissory note for the further sum of $14,750.00, with Joe Lyons, Julius Record, L. P. Harrison, N. H. Ragland, and C. I. Broad as sureties, said note due and payable on Dec. 15th, 1889, with interest at the rate of one per cent. per month from maturity and ten per cent. attorneys' fees if collected by law or placed for collection; that on or about the 26 day of April, 1889, the said Lyons-Thomas Hardware Company were justly indebted unto intervenor in the further sum of money hereinafter set — and did on said last-named date make, execute, and deliver unto intervenor its promissory note for the further sum of $11,072.50, due and payable on Dec. 31st, 1889, with interest at the rate of one per cent. per month from maturity and ten per cent. attorneys' fees if collected by law or placed for collection, with Joe Lyons, Julius P. Record, L. P. Harrison, N. H. Ragland, and C. I. Broad as sureties; that afterwards, to wit, on or about the 9th day of November, 1889, the said Lyons-Thomas Hardware Company were justly indebted unto intervenor in the further sum of $6,514.83 for an overdrawn account for money advanced by said intervenor for said Lyons-Thomas Hardware Company upon their checks, and the same being actual cash, and which said account was, on said last-named date, presented to said Lyons-Thomas Hardware Company, and was then and there agreed by them to be just and correct and became an account stated between them & intervenor; that the amounts embraced in each of the said above-

mentioned notes and the amount of said account for $6,514.83 were each and all for indebtedness of said Lyons-Thomas Hardware Company in and about its business at Paris, Texas, and the several amounts therein mentioned were each and every one procured by said Lyons-Thomas Hardware Company from intervenor in cash and used in and about its said busiuess at Paris, Texas; that on or about said Nov. 9, 1889, the said Lyons-Thomas Hardware Company in order to further secure the said indebtedness to intervenor, as well as the other debts in said mortgage mentioned, to wit, certain indebtedness to the Paris Exchange bank upon two promissory notes—one for $3,370.75, dated March 1st, 1889, and due Feb'y 1st, 1890, with Joe Lyons, Julius Record, T. J. Record, and C. I. Broad, sureties; the other note for $3,333.35, dated March 1st, 1889, and due Jan'y 1st, 1890, with Joe Lyons, Julius P. Record, T. J. Record, John C. Gibbons, & W. T. Gunn as sureties—each of said notes being executed by the Lyons-Thomas Hardware Company, as principal; and intervenor is informed and believes and charges the fact to be that each of said notes were executed for monies used by said Lyons-Thomas Hardware Company in and about its said business, — did on said Nov. 9th, 1889, make, execute, and deliver unto L. P. Harrison, as trustee, at the instance and request of intervenor, a certain chattel mortgage upon all of its stock of goods, wares, and merchandise, and all of its personal property, and in connection with its business at Paris, Texas, and all of which is more fully described in a certified copy of said chattel mortgage hereto attached and made a part hereof, marked "Exhibit A," and to which reference is here made for a more particular description of said property and of said debts; that at the time of the execution of said chattel mortgage the said Lyons-Thomas Hardware Company executed the same with the consent and under the direction and advice of its stockholders and directors, for the purpose of securing the above-described debts, and at said time there was no encumbrance or lien whatever existing upon said property, and said Lyons-Thomas Hardware Company had a good and perfect right to execute said mortgage to further secure their said debts, which had been created in the due course of their trade and business; that said chattel mortgage above described was executed in good faith to secure said debts and to save harmless their personal sureties, and each security was accepted in good faith by intervenors with the consent & advice of said sureties, and said trustee was immediately placed in full possession of all of said property and took possession thereof after accepting said trust in writing and agreeing to execute the same; that said chattel mortgage was duly and legally filed in the office of the clerk of the county court in and for Lamar county, Texas, at 5.20 o'clock p. m., on said Nov. 9, 1889, and was duly and legally registered therein in the book of chattel mortgages, in Book No. 5, pages 75 & 76; that said L. P. Harrison, as such trustee, is now still in possession of all of said property, and was proceeding to execute said trust and was proposing to sell said property in compliance with the terms of said chattel mortgage when restrained by your honor's order granted herein; that said

property mentioned and set out above is such that the same will greatly deteriorate in value, and is liable to be destroyed by fire, and to incur heavy expense in keeping & storing the same, and should be sold as soon as practicable, and now is the season of the year at which the same can be sold to the best advantage and for the greatest amount of money.

Intervenor avers that it knows nothing and has no means of knowing anything concerning the validity of pl'ffs' debts or the amount of other indebtedness of said Lyons-Thomas Hardware Company, but it avers the fact to be that the security given for its debts above set out was given and taken in good faith, and that the amount of said chattel mortgage was largely less than the capital stock of said Lyons-Thomas Hardware Company, and that its assets were largely more than those contained in such chattel mortgage; that it is true, as stated in pl'ffs' petition, that this intervenor and the said trustee refuse to recognize any right of any other creditor or creditors of the Lyons-Thomas Hardware Company to share with intervenor and other creditors secured in said chattel mortgage in such security, but it avers that pl'ffs have their remedy at law, which is ample and complete to secure any and all rights that they may have, if any. These intervenors deny that pl'ffs represent or have any right to represent the claim and debts of this intervenor or any other creditor of said Lyons-Thomas Hardware Company except themselves; whereupon intervenors pray that their plea be considered by your honor, and that they be allowed to defend their security for their said debts; that the application of pl'ffs for a receiver be denied and refused; that the injunction herein be dissolved, and that the trustee, L. P. Harrison, be permitted to sell said property and apply the proceeds to the payment of said debts according to said chattel mortgage, for costs and for general relief.

MAXEY, LIGHTFOOT & DENTON,
Att'ys for Intervenor.

STATE OF TEXAS, }
Lamar County. }

Before me, the undersigned authority, on this day personally appeared H. A. Bland, cashier of the Farmers' & Merchants' bank, to me well known, who says on oath that the facts as set out in the foregoing plea of intervention are true.

H. A. BLAND, *Cashier.*

Sworn to and subscribed before me on this the 29th day of November, A. D. 1889.

W. R. WOOD,
Clerk Dist. Ct., Lamar Co., Tex.,
[SEAL.] By W. B. KAVANAUGH, *Deputy.*

"EXHIBIT A."

STATE OF TEXAS, }
Lamar County. }

Know all men by these presents that the Lyons-Thomas Hardware Company for and in consideration of the sum of one dollar to us in hand paid, the receipt of which is hereby acknowledged and for the further consideration and trusts hereinafter set forth and expressed do hereby grant bargain sell convey set over and deliver unto L. P. Harrison as trustee all the following-described property situate in Paris Lamar county, Texas, to wit: All of our stock of goods, wares & merchandise of whatsoever kind nature or description situate and being in our storehouse and place of business on the west side of the public square in Paris, Texas, fronting on said public square and also upon Grand avenue and running through the block to Short street in the building belonging to John Gibbons and known as the Lyons-Thomas Hardware Company's store said stock of goods wares and merchandise consisting of hardware stoves tinware glassware flasks bottles silver-plated ware cutlery brass goods guns pistols, ammunition, statuary, clocks, iron nails wagons wagon bows and thimbles barbed wire smooth wire ties scales builders' hardware tin plates farm supplies queensware toilet ware chinaware, lamps and lamp fixtures refrigerators ice-cream freezers water-coolers and everything whatsoever embraced in our stock of goods wares and merchandise and situate in our said storehouse together with one large iron safe now situate in said building and the back platforms attached to said building and all fixtures showcases stoves *showcases stoves* counters desks shelves and all furniture tools implements and utensils and all property of whatsoever kind nature or description situate in said storehouse. Also all of our books accounts notes, choses in action and evidence of debt appertaining to our said business and situate in said storehouse. Also all our new two-horse delivery wagon- and one set of double harness with the same also one old single-horse spring delivery wagon and one set of old single harness with the same. Also one bay horse about nine years old named "Doc" also one gray mare about eight years old named "Nelly" also one brown horse mule about twelve years old named "Jack" also one double-seated one & two horse surrey now situated and being in the west store-room on Grand avenue on lot one block 23 Grand Avenue street in Paris, Texas. Also a lot of goods wares and merchandise stored in a certain building belonging to and owned by J. G. Dudley fronting on Grand avenue in Paris Texas and known as the old Dick Cowan storehouse, said goods wares & merchandise consisting of single-trees whiffle-trees double-trees hames barbed wire, wheels boy wagons and other property including all the goods wares and merchandise of whatsoever kind nature or description situate in said building and belonging to the stock of Lyons-Thomas Hardware Company. Also a lot of goods wares and merchandise situate and being in two storehouses owned by us located on Grand avenue being a part of lot No. 1 in block 23 in said city of Paris fully described in a certain

deed duly recorded in Lamar County Registry of Deeds Book volume 61 page 489, (but the said storehouses and lots themselves are not embraced in this mortgage) said goods wares and merchandise situate in said two buildings or storehouses so located consists of sash doors blinds screens transoms screen doors screen windows and other builders' material stoves refrigerators lawn-mowers ties barbed wire smooth wire coffee-mills scales glassware lamps and lamp fixtures goblets, rope and all other goods wares and merchandise of whatsoever kind nature or description situate in said two storehouses last above mentioned. Also a lot of goods wares and merchandise consisting of powder boxes, cans flasks bottles and other property situate in a certain building known as the Lyons-Thomas Hardware Company's magazine, situate upon a certain tract of land owned by us on North Main street in the north part of the city of Paris fully described in a certain deed duly recorded in Lamar County Registry of Deeds Book Z, volume 2, page 255 (but the said real estate is not embraced in this mortgage) including all the personal property goods wares and merchandise situate in said magazine building, and all of said above-described personal property is hereby delivered to said trustee and he is fully authorized to take actual possession of the same & such possession is hereby given to him in trust for the following purposes and considerations and this instrument is intended as a trust for the following purposes, to wit: Whereas the said Lyons-Thomas Hardware Company is justly indebted unto the following-named parties in the several covenants hereinafter set forth as follows, to wit: 1st. Amount due the Farmers' & Merchants' bank for overdrawn accounts the sum of $6,514.83. 2nd. Note of the Lyons-Thomas Hardware Company to the Farmers' & Merchants' bank dated April 26th, 1889, due Dec. 1, 1889, with int. at one per cent. per month from maturity and ten % att'ys' fees if collected by law or placed for collection, with Joe Lyons, Julius P. Record, L. P. Harrison & J. D. Thomas as sureties and endorsed by C. I. Broad & N. H. Ragland said note being for the sum of $13,308.60. 3rd. One note of the Lyons-Thomas Hardware Company to the Farmers' & Merchants' bank dated April 26, 1889, and due Dec. 15th, 1889, with interest at the rate of one per cent. per month from maturity and 10% att'ys' fees if collected by law or placed for collection, with Joe Lyons, Julius P. Record, L. P. Harrison, N. H. Ragland and C. I. Broad as sureties for the sum of $10,750. 4th. One note of the Lyons-Thomas Hardware Company to the Farmers' & Merchants' bank dated April 26, 1889, due Dec. 31st, 1889, with interest at the rate of one per cent. per month from maturity and 10% att'ys' fees if collected by law or placed for collection, with Joe Lyons, Julius P. Record, L. P. Harrison, N. H. Ragland and C. I. Broad as sureties for the sum of $11,072.50. 5th. One note of the Lyons-Thomas Hardware Company to the Paris Exchange bank dated March 1st, 1889, due Jan'y 1st, 1890, with interest at the rate of one per cent. per month from maturity & 10% att'ys' fees if collected by law or placed for collection, with Joe Lyons, Julius P. Record, T. J. Record, Jno. C. Gibbons & W. T. Gunn sureties for the sum of $3,333.35. 6th. One note of Lyons-

Thomas Hardware Company to the Paris Exchange bank dated March 1st, 1889, due Feb. 1st, 1890, with interest at one per cent. per month after maturity & 10% att'ys' fees if collected by law or placed for collection, with Joe Lyons, Julius Record, T. J. Record, C. I. Broad as sureties for the sum of $3,370.75.

Now the said mortgagor in order to save harmless its sureties and to more perfectly secure said claims and whereas this mortgage is given as additional security for such above debts. And whereas the said Lyons-Thomas Hardware Company owe other debts which they expect to secure and pay out of other personal and real property owned by them in nowise connected with the above property. And whereas the said Lyons-Thomas Hardware Company is especially anxious to secure the above-described debts and have executed this mortgage for that purpose. Now the said trustee shall take possession of all of said property and the same is hereby delivered to him and he shall sell all of said property as soon as practicable either at public or private sale and in such quantities as will realize the largest amount of money, giving public notice for a reasonable length of time of any such sale and shall collect all of said notes accounts and other debts which can be collected and may sell such as cannot be collected within six months and shall apply the proceeds of such property and claims — payment to the above-described debts in the order above mentioned and set forth, but it is expressly stipulated that if the said Lyons-Thomas Hardware Company shall at any time well and truly pay off and satisfy all of the above-described notes and debts according to their tenor and effect then this mortgage shall be void and of no effect and satisfaction of the same shall be entered in the book in which this instrument is entered in the office of the clerk of the county court in and for Lamar county Texas. It is further stipulated and agreed that if the said trustee should die or refuse or become incapacitated or fail for any cause to carry out the foregoing trust then the president of the said Farmers' & Merchants' bank may appoint a substitute trustee in his place who shall execute the said trust as fully as if especially appointed for that purpose in the first instance.

In testimony whereof the said Lyons-Thomas Hardware Company by the instruction of its directors and stockholders hath hereunto caused to be affixed the official signature of its president and secretary under the seal of said corporation, this the 9th day of November A. D. 1889. The words on 3rd page "as soon as practicable" and the words "and claims" and also on 4th page the words "is intended" were interlined before signing. The words and figures on 3rd page for the sum of $10,750 interlined before signing.

Also on 3rd page interlined so as to include on margin debt of $3,370.75 to Paris Exchange bank as therein described as last debt mentioned.

LYONS-THOMAS HARDWARE COMPANY,
By JOE LYONS, *President.*
JULIUS P. RECORD, *Sec'y.*

Witness:
B. J. BALDWIN, JR.
D. H. SCOTT.

STATE OF TEXAS, }
Lamar County. }

Before me, B. J. Baldwin, Jr., notary public in and for Lamar county, Texas, on this day personally appeared Joe Lyons, president, and Julius P. Record, secretary, of the Lyons-Thomas Hardware Company, both to me well known to be the persons whose names are subscribed to the foregoing instrument of writing, and who each acknowledge that they executed the same for the purposes and considerations therein stated and expressed and in the capacity therein named.

[SEAL.] In testimony whereof I hereunto affix my official signature on the 9th day of November, A. D. 1889.

B. J. BALDWIN, JR.,
Notary Public in and for Lamar County, Texas.

I hereby accept the above and foregoing trust and agree to execute and perform the same this Nov. 9th, A. D. 1889.

L. P. HARRISON, *Trustee.*

Witness:
B. J. BALDWIN, JR.
D. H. SCOTT.

The Lyons-Thomas Hardware Company *to* L. P. Harrison, trustee Farmers' & Merchants' bank & Paris Exchange bank, *cestuis que trust.* } Chattel Mortgage.

Received in my office and filed this 9th day of November, 1889, at 5.20 o'clock p. m.

SAM. H. HANCOCK,
Clerk County Court, Lamar County, Texas.

STATE OF TEXAS, }
Lamar County. }

I, Sam. H. Hancock, clerk county court of Lamar county, Texas, do hereby certify that this and the above and foregoing 7 pages contain a true and correct copy of the original chattel mortgage of the Lyons-Thomas Hardware Company to L. P. Harrison, trustee, now on file in my office, also duly registered in Chattel Mortgage Book No. 5, pages 75 & 76, of Lamar county.

[SEAL.] Given under my hand and seal of office this 11th day of November, 1889.

SAM. H. HANCOCK,
Clerk Co. Ct., Lamar Co., Tex.,
By C. G. HANCOCK, *Deputy.*

Indorsed: No. 4691. The Perry Stove Mfg. Co. *vs.* Lyons-Thomas Hardware Company *et al.* Plea of intervention of the Farmers' & Merchants' bank. Filed November 29th, 1889. W. R. Wood, clerk dist. ct., Lamar Co., Tex., by W. B. Kavanaugh, deputy.

(Record, p. 67.)

Answer of Baker Wire Co.

THE PERRY STOVE MFG. CO. & Others
v.
LYONS-THOMAS HARDWARE CO. *et al.*

Now comes the defendant The Baker Wire Company, and for answer to plaintiffs' petition praying for the appointment of a receiver says that this defendant did, on the — day of November, 1889, & since the execution of the mortgages mentioned in the petition bring suit against The Lyons-Thomas Hardware Company and L. P. Harrison for the recovery of certain wire and staples which the defendant Harrison was claiming to hold under said mortgages; that this defendant had prior to the month of Nov., 1889, sold said goods to the said hardware Co. at a time when said company was insolvent, & that at the time of such sale said company bought said goods with the intent not to pay for them, and that said company fraudulently concealed from this defendant the fact of its insolvency and of its intention not to pay for said goods, and by such wrongful and fraudulent means obtained from this def't the possession of said property; that by said suit this defendant seeks to rescind said sale and recover the goods; but this defendant further says that in the event it should appear on the trial of said cause that it is not entitled to rescind such sale, then it is and will be entitled to a judgment for the price for which it sold said goods, and, further, that this defendant's claim for the amount of $1,956.94 is among those provided for and secured by the mortgages mentioned by pl'ffs, by reason of all which this def't is interested in this wise, prudent, and economical administration, management, and disposition of this property embraced in said mortgages; that the personal property embraced therein is of great value, approximating, so this defendant is informed & believes and charges the fact to be, one hundred thousand dollars; that said Harrison was security, if he is not now a stockholder, in said hardware Co., and that his relation to the same is such that some other person wholly disinterested could better administer such trust and afford better assurance to those interested by the execution of a bond and its administration under the direction of the court, and that this def't fears that said Harrison will waste said property and by bad management impair the value of this defendant's security, and that said hardware Co., which is a corporation, is insolvent; for all which reasons this def't joins in pl'ffs' prayer for the appointment of a receiver.

ROSS & SCOTT &
H. D. McDONALD,
Att'ys for Baker Wire Co.

R. L. Ross, attorney for the Baker Wire Co., being sworn, states that the allegations in the foregoing answer are true.

R. L. ROSS.

Sworn to and subscribed before me by the said R. L. Ross on this the 23rd day of November, A. D. 1889.

Witness my official signature and seal of office day and [SEAL.] date above written.

W. R. WOOD,
Clerk District Court, Lamar County, Tex.

Indorsed: No. 4691. Perry Stove Mfg. Co. *vs.* Lyons-Thomas Hardware Co. *et al.* Ans. of Baker Wire Co. Filed Nov. 23, 1889. W. R. Wood, clerk dist. ct., Lamar Co., Tex.

(Record, p. 69.)

Answer of W. T. Gunn et al.

In the District Court of Lamar County, Texas.

THE PERRY STOVE MFG. CO. *et al.*
vs.
THE LYONS-THOMAS HARDWARE CO. *et al.* } No. 4691.

Now comes W. T. Gunn, T. J. Record, John C. Gibbons, N. H. Ragland, C. I. Broad, J. D. Thomas, L. P. Harrison (in his individual capacity), The Paris Exchange Bank, and The Farmers' & Merchants' Bank, and for answer to plaintiffs' 2nd amended original petition filed in this cause on the 30th day of March, 1891, says that said petition states no cause of action against them or either of them. Said petition does not show that plaintiffs have been deprived of any right by these defendants or either of them, or that they or either of them have been guilty of any wrong; and of this they pray judgment of the court.

DUDLEY & MOORE,
Attorneys for Defendants.

And for further answer and special exception to said amended petition, these defendants say the same is insufficient because:

1. First. It does not allege and show that plaintiffs have exhausted their remedy at law, and that they have judgments against the said Lyons-Thomas Hardware Company, and that these said judgments cannot be collected on execution against the said Lyons-Thomas Hardware Co.

2. Second. Because there is a misjoinder of causes of action. The plaintiffs in their said amended petition seek to litigate in one suit not only the equitable rights of the creditors of the said Lyons-Thomas Hardware Co., but seek to recover of alleged stockholders or members of said corporation for unpaid stock and for capital stock wrongfully transferred or misapplied, and also seek to recover in the same suit damages of the trustee of the said Lyons-Thomas Hardware Company for alleged waste, devestavit, and misapplication of the property or money which came into his hands as such trustee.

3rd. Because it appears from plaintiffs' said amended petition that the Laughlin Nail Co., Curtis Bros. & Co., Sargent & Co., and W. M.

Rogers Manufacturing Co. are the only parties for whose benefit one of the alleged deeds of trust was executed, who are relying on their security, and they are not before the court nor made parties to this suit; all of which defendants pray the judgment of the court.

DUDLEY & MOORE,
Attorneys for Defendants.

Further answering, these defendants says that they deny all and singular the allegations in said amended petition contained and call for the proof.

DUDLEY & MOORE,
Attorneys for Defendants.

Further answering, these defendants say that they are and were *bona fide* creditors and mortgagees of the defendant The Lyons-Thomas Hardware Co. for a valuable consideration, without notice of plaintiffs' claims, and without notice that said hardware Co. was insolvent or without notice of any fraud on the part of said company; and they here refer to and adopt their pleas of intervention and answers heretofore filed and the allegations therein as and for their special answer to plaintiffs' amended petition, as far as the same *is* pertinent and applicable.

That the mortgage executed by said hardware Co. for the benefit of these defendants was executed prior to the other alleged mortgage; that said hardware Co. mortgaged and pledged a portion of its property to these defendants to secure them, as is alleged in their plea of intervention; that when they took possession of the property they had no notice of any other mortgage or deed of trust; that on the 29th day of November, 1889, the judge of this court made an order in this cause, being then a proceeding for an injunction and a receiver by plaintiffs and an application in said proceedings by these defendants to allow the trustee named in said mortgage to execute and settle the same under the orders and direction of this court, by the terms of which order said trustee was to take possession of said mortgaged property and to settle the same and pay over the proceeds to the parties secured by said mortgage, according to their respective rights, and the balance to pay into court; that plaintiffs and the Baker Wire Co. were parties to such proceedings; that said order and judgment was ordered to and has been entered upon the minutes of this court and is a part of the record of this cause, and has never been vacated or set aside, but is in full force.

Wherefore, having fully answered, these defendants pray that they may go hence with their costs, and that their rights under said mortgage be held *reas adjudicata.*

DUDLEY & MOORE,
Attorneys for Defendants.

Indorsed: No. 4691. The Perry Stove Mfg. Co. *vs.* Lyons & Thomas Hardware Co. *et al.* Answer for W. T. Gunn *et al.* to plaintiffs' 2nd amended original petition. Filed April 7, 1891. G. W. Martin, clerk dist. ct., Lamar Co., Texas, by W. B. Johnson, deputy.

(Record, p. 71.)

1st Supplemental Petition.

THE PERRY STOVE MFG. CO. *et al.* } No. 4691. Suit Pending in
vs. } Dist. Court, Lamar Co.,
THE LYONS-THOMAS HDW. CO. *et al.* } Tex.

By leave of court, plaintiffs come and file this *its* first supplemental petition in reply to the answer of W. T. Gun *et al.*, intervenors, & L. P. Harrison, trustee, filed in this cause on the 7th day of November, A. D. 1890, and especially except to all that part of said answer which sets up that said intervenors & L. P. Harrison, trustee, were *bona fide* creditors and mortgagees of the defendant The Lyons-Thomas Hardware Co. for a valuable consideration without notice, and that the mortgage to said intervenors & L. P. Harrison, trustee, was a prior mortgage, and that they (intervenors & Harrison, trustee) took possession of the mortgaged property without notice of any other mortgage or deed of trust, and that said property was sold by a trustee under the order of this court made in chambers because said answer presents no defense to the plaintiffs' creditors' bill filed in this cause.

HALE & HALE AND
T. S. HILL,
Att'ys for Pl'ffs.

Further replying to said answer, these plaintiffs deny all and singular the allegations in said answer contained and put themselves upon the country.

HALE & HALE,
T. S. HILL,
Att'ys for Pl'ffs.

Indorsed: No. 4691. Perry Stove Mfg. Co. *et al. v.* Lyons-Thomas Hdw. Co. *et al.* 1st supplemental petition. Filed April 7, 1891. G. W. Martin, clerk dist. ct., Lamar Co., Tex., by W. B. Johnson, dep'y.

(Record, p. 72.)

Withdrawal of Answer by Baker Wire Co.

PERRY STOVE MFG. CO. *et al.* }
v. } D. C., Sp'g T., 1891.
LYONS-THOMAS HDW. CO. *et al.* }

Now comes the Baker Wire Co. and, referring specially to the answer filed herein on Nov. 23, 1889, wherein it joined in the plaintiffs' prayer for the appointment of a receiver for reasons therein

Rogers Manufacturing Co. are the only parties for whose benefit one of the alleged deeds of trust was executed, who are relying on their security, and they are not before the court nor made parties to this suit; all of which defendants pray the judgment of the court.

DUDLEY & MOORE,
Attorneys for Defendants.

Further answering, these defendants says that they deny all and singular the allegations in said amended petition contained and call for the proof.

DUDLEY & MOORE,
Attorneys for Defendants.

Further answering, these defendants say that they are and were *bona fide* creditors and mortgagees of the defendant The Lyons-Thomas Hardware Co. for a valuable consideration, without notice of plaintiffs' claims, and without notice that said hardware Co. was insolvent or without notice of any fraud on the part of said company; and they here refer to and adopt their pleas of intervention and answers heretofore filed and the allegations therein as and for their special answer to plaintiffs' amended petition, as far as the same *is* pertinent and applicable.

That the mortgage executed by said hardware Co. for the benefit of these defendants was executed prior to the other alleged mortgage; that said hardware Co. mortgaged and pledged a portion of its property to these defendants to secure them, as is alleged in their plea of intervention; that when they took possession of the property they had no notice of any other mortgage or deed of trust; that on the 29th day of November, 1889, the judge of this court made an order in this cause, being then a proceeding for an injunction and a receiver by plaintiffs and an application in said proceedings by these defendants to allow the trustee named in said mortgage to execute and settle the same under the orders and direction of this court, by the terms of which order said trustee was to take possession of said mortgaged property and to settle the same and pay over the proceeds to the parties secured by said mortgage, according to their respective rights, and the balance to pay into court; that plaintiffs and the Baker Wire Co. were parties to such proceedings; that said order and judgment was ordered to and has been entered upon the minutes of this court and is a part of the record of this cause, and has never been vacated or set aside, but is in full force.

Wherefore, having fully answered, these defendants pray that they may go hence with their costs, and that their rights under said mortgage be held *res adjudicata.*

DUDLEY & MOORE,
Attorneys for Defendants.

Indorsed: No. 4691. The Perry Stove Mfg. Co. *vs.* Lyons & Thomas Hardware Co. *et al.* Answer for W. T. Gunn *et al.* to plaintiffs' 2nd amended original petition. Filed April 7, 1891. G. W. Martin, clerk dist. ct., Lamar Co., Texas, by W. B. Johnson, deputy.

(Record, p. 71.)

1st Supplemental Petition.

THE PERRY STOVE MFG. CO. *et al.* *vs.* THE LYONS-THOMAS HDW. CO. *et al.* } No. 4691. Suit Pending in Dist. Court, Lamar Co., Tex.

By leave of court, plaintiffs come and file this *its* first supplemental petition in reply to the answer of W. T. Gun *et al.*, intervenors, & L. P. Harrison, trustee, filed in this cause on the 7th day of November, A. D. 1890, and especially except to all that part of said answer which sets up that said intervenors & L. P. Harrison, trustee, were *bona fide* creditors and mortgagees of the defendant The Lyons-Thomas Hardware Co. for a valuable consideration without notice, and that the mortgage to said intervenors & L. P. Harrison, trustee, was a prior mortgage, and that they (intervenors & Harrison, trustee) took possession of the mortgaged property without notice of any other mortgage or deed of trust, and that said property was sold by a trustee under the order of this court made in chambers because said answer presents no defense to the plaintiffs' creditors' bill filed in this cause.

HALE & HALE AND
T. S. HILL,
Att'ys for Pl'ffs.

Further replying to said answer, these plaintiffs deny all and singular the allegations in said answer contained and put themselves upon the country.

HALE & HALE,
T. S. HILL,
Att'ys for Pl'ffs.

Indorsed: No. 4691. Perry Stove Mfg. Co. *et al. v.* Lyons-Thomas Hdw. Co. *et al.* 1st supplemental petition. Filed April 7, 1891. G. W. Martin, clerk dist. ct., Lamar Co., Tex., by W. B. Johnson, dep'y.

(Record, p. 72.)

Withdrawal of Answer by Baker Wire Co.

PERRY STOVE MFG. CO. *et al.* *v.* LYONS-THOMAS HDW. CO. *et al.* } D. C., Sp'g T., 1891.

Now comes the Baker Wire Co. and, referring specially to the answer filed herein on Nov. 23, 1889, wherein it joined in the plaintiffs' prayer for the appointment of a receiver for reasons therein

stated, *and* now here asks leave of the court to withdraw its said answer. It states that the court refused to appoint a receiver as prayed for by pl'ffs in said suit, and, further, that its suit against L. P. Harrison, referred to in its said answer, for the recovery of the property therein referred to is still pending and undetermined in this court, and it is prosecuting and proposing to continue to prosecute this cause to a final determination thereof, and, further, that the plaintiffs herein have dismissed this suit as to the said Baker Wire Co.; and now, in order that there may be no adjudication of this cause that will in any manner bind it or effect its rights in the prosecution of its said suit against said Harrison and here electing to pursue its remedy against said Harrison in said suit, it here withdraws the said answer in this suit and prays to be dismissed herein without prejudice.

ROSS & SCOTT &
H. D. McDONALD,
Att'ys for Baker Wire Co.

Indorsed: 4691. Perry Stove Mfg. Co. *v.* Lyons-Thomas Hdw. Co. Withdrawal of answer by Baker Wire Co. Filed April 7, 1891. G. W. Martin, clerk dist. ct., Lamar Co., Tex., by W. R. Wood, deputy.

(Record, p. 73.)

Judgment.

In the District Court of Lamar County, Texas, Setting at Chambers at Paris, Texas, Nov. 29, A. D. 1889.

THE PERRY STOVE MFG. — *et al.*
vs.
THE LYONS-THOMAS HARDWARE CO., L. P. HARRISON, *et al.* } No. 4691.

Be it remembered that this cause coming on to be heard upon the petition of plaintiffs and the answer of defendants and the petition of intervenors and the supporting affidavits, and the court having fully heard said cause and the arguments of counsel and being fully advised, the court finds that the chattel mortgage executed by the Lyons-Thomas Hardware Company on Nov. 9, 1889, to L. P. Harrison, as trustee, upon certain goods, wares, and merchandise in Paris, Texas, a copy of said chattel mortgage being attached to the plea of intervention of the Farmers' and Merchants' bank filed herein and duly registered in the office of the clerk of the county court in for Lamar county, Texas, in Book 5, pages 75 & 76, to which reference is here made for more particular description of said chattel mortgage and of the property & debts, and also a certain deed of trust upon real estate, executed by said Lyons-Thomas Hardware Company to L. P. Harrison, trustee, on said Nov. 9, 1889, said real

estate being situate in Lamar county, Texas, and said original deed of trust being attached to the answer of defendants L. P. Harrison and others, filed herein and duly recorded in Lamar County Registry of Deeds of Trust, Book 6, page 403 *et seq.*, and to which reference is here made for description of the property, deed of trust, and debts, and also a certain deed of trust and chattel mortgage executed by said Lyons-Thomas Hardware Company to L. P. Harrison, as trustee, on Nov. 9, 1889, upon certain real estate and personal property. A copy of said deed of trust and chattel mortgage is attached to the answer of L. P. Harrison & others filed herein, and is duly recorded in Lamar county registry of deeds of trust, Book 6, page 406, and is also duly registered in the office of the clerk of the county court in and for Lamar county, Texas, in Registry Book 5, page- 77 & 78, to all of which reference is here made for description of said instrument and the property and the debts secured, and it is considered by the court that each and every one of said chattel mortgages and deeds of trust above mentioned are good and valid securities for the debts therein mentioned and set forth, and the same shall be executed and carried out by the trustee therein mentioned in accordance with the provisions and terms of said instruments. It is further ordered, adjudged, and decreed by the court that the temporary injunction granted in this cause be, and the same is hereby, dissolved; that the applications filed herein by plaintiffs and The Baker Wire Company, defendant, and by intervenors and others for a receiver be, and the same are hereby, denied and refused, and this court refuses to appoint a receiver. It is further ordered, adjudged, and decreed by the court that the application of L. P. Harrison, trustee, and of W. T. Gunn and others, intervenors, that the court for the protection of said trustee and said beneficiaries in said chattel mortgages and deeds of trust shall allow said trust to be executed under the direction of this court, be, and the same are hereby, granted, and it is ordered, adjudged, and decreed that said L. P. Harrison, trustee, continue in and hold possession of all of said property described in said instruments, and he be, and is hereby, ordered and directed to execute bond in the sum of $85,000.00, payable to the clerk of this court, and it is to be approved by him, conditioned that said trustee shall faithfully execute said trusts and perform all of his duties as such trustee in accordance with the terms of said instruments of writing and pay over all sums of money coming into his hands as such trustee to the beneficiaries named in such instruments according to the priorities and in the manner indicated therein, and shall account to this court for his action therein, and if any balance remains in his hands after discharging the several amounts of indebtedness, the payment of which is provided for in said deeds of trusts and the expenses of executing said trust, that he hold the same in his hands subject to the further order of this court. It is further ordered, adjudged, and decreed that said L. P. Harrison, as such trustee, with W. A. Collins and Beddie Hale, as appraisers, shall return to the clerk of this court and file in his office an inventory and appraisement of all the prop-

erty, both real and personal, embraced in said chattel mortgages and deeds of trust, such inventory and appraisement to be filed under oath as soon as practicable, and after the filing and approval of said bond and the filing of said inventory the said trustee shall proceed to sell said property under the advertisement here before made and in accordance with the terms of said instrument of writing above described, and shall execute and fully carry out the provisions of said trusts under the direction and supervision of this court, and shall report his action therein to this court and file his accounts and vouchers with the clerk of this court on or before the first day of its next term, to be held for Lamar county at Paris, Texas, on the 6th Monday after the 3rd Monday in February, A. D. 1890, and the clerk of the district court of Lamar county, Texas, is hereby ordered to file this judgment among the papers of the above-entitled cause and to enter the same upon the minutes of said court.

Witness my official signature the day and date first above written.

E. D. McCLELLAN,
Judge 6th Judicial District.

Attest with signature and seal:

W. R. WOOD,
Clerk Dist. Ct., Lamar Co., Tex.

Indorsed: No. 4691. The Perry Stove Mfg. Co. *et al. vs.* The Lyons-Thomas Hardware Company *et al.* Judgment. Filed November 29, 1889. W. R. Wood, clerk dist. ct., Lamar Co., Tex.

* * * * * * *

(Record, p. 81.)

Judgment.

In the District Court of Lamar County, Tex.

THE PERRY STOVE MANUFACTURING Company, Schoverling, Daly & Gale, Merchant & Company, The Potter Co-operative Company, The Favorite Stove & Range Company, The Joseph Hafner Manufacturing Company, The Miami Stove Works, The Reading Hardware Company, J. H. Baum, J. Rosenblatt & Company, J. Patterson & Son, The Bronson Supply Company, The Central Stamping Company, Peter Wright & Sons, B. Kittridge Arms Company, The Junction Arms Company, The Alaska Refrigerator Company, R. Wilson & Company, Alfred Field & Company, The Ansonia Clock Company, Knowles, Taylor & Knowles, The St. Louis Shovel Company, Koeller & Schmitz, Griswold Bros., The Bristol Brass Clock Company, The Superior Barbed Wire Company, The Henry Sears Company, The Phillips Burtoff Manufacturing Company, Manning Bowman & Company, The Racine Hardware Company, Peck, Stow & Wilcox, Hubbard and Company, Adolph Kastor Bros., The Consolidated Manufacturing Company, The Quincy Show Case Company, The Ferris Hame Company, The Paint Bottle Works, J. Leopold & Company, J. R. Torry & Company, Stephens & Company, F. Myrose & Company, The Brumwell Brush & Wire Goods Company, R. Wallace & Sons, and Simpson, Hall, Miller & Company	4691.	Creditors' Bill.
vs.		
THE LYONS-THOMAS HARDWARE COMPANY, L. P. Harrison, The Baker Wire Company, and The Paris Exchange Bank, Defendants, and Joe Lyons, Julius P. Record, J. D. Thomas, N. H. Ragland, Charles I. Board, T. J. Record, W. T. Gunn, John C. Gibbons, and The Farmers' and Merchants' Bank, Intervenors.		

MONDAY, *May 4th, A. D.* 1891.

On this day this cause came on for trial, and all the parties—plaintiffs, defendants, intervenors—being in court, represented by counsel,

announced ready for trial, and the jury heretofore called for by the plaintiffs, by and with the agreement and consent of the defendants and intervenors, was waived, and the matters of both law and of facts submitted to the court, who, after having heard the pleadings read, the evidence adduced, and the arguments of counsel for all the parties, and being sufficiently advised, is of the opinion that the equities, the law, and the facts are with the plaintiffs, and that they ought to recover in this suit.

It is, therefore, considered, ordered, adjudged, and decreed by the court as follows, to wit:

1st. That the plaintiffs have and recover judgment against the defendant L. P. Harrison for the sum of fifty-seven thousand five hundred and twenty-nine dollars and forty-four cents, it being the amount of the proceeds of the sales of the real and personal property and assets of the said Lyons-Thomas Hardware Company, with eight per cent. interest thereon, since he received said money, less his costs, expenses, and commissions, for selling the same and executing the trust imposed on him by said three several deeds of trust or mortgages from the Lyons-Thomas Hardware Company to him of date November 9th, 1889, and on the same day delivered to and accepted by said L. P. Harrison.

2nd. That the said plaintiffs do have and recover of and from the intervenors The Farmers' and Merchants' Bank the sum of forty-eight thousand one hundred and ninety-three dollars and seventy cents, it being the amount, together with eight per cent. interest thereon from the 1st day of February, 1890, paid over to the said Farmers' and Merchants' bank by L. P. Harrison out of the proceeds of the sale of the said assets of the Lyons-Thomas Hardware Company conveyed and delivered to him, as above stated, on the 9th day of November, 1889, which amount was received by the said Farmers' and Merchants' bank as a payment on their debts preferred in said mortgages or deeds of trust executed and delivered by the Lyons-Thomas Hardware Company to L. P. Harrison.

3rd. That the said plaintiffs do have and recover of and from the said defendant, The Paris Exchange Bank, judgment for the sum of seven thousand five hundred and eight dollars and ten cents, being the amount, together with eight per cent. interest thereon from the 1st day of April, 1890, paid to said Paris Exchange bank out of the proceeds of said property conveyed and delivered to L. P. Harrison by said Lyons-Thomas Hardware Company on the 9th day of November, 1889, and afterwards sold by said L. P. Harrison, which amount was received by said defendant, Paris Exchange Bank, in payment of the debts held by it against said Lyons-Thomas Hardware Company, and was one of the preferred debts in one of said deeds of trust or mortgages above named.

4th. It is further adjudged and decreed by the court that the Farmers' and Merchants' bank, the Paris Exchange bank, and L. P. Harrison each be, and are hereby, commanded, adjudged, and required to pay into the hands of the clerk of this court, within ninety days from this date, the respective amounts of money adjudged

herein against them respectively, together with eight per cent. interest thereon from this date.

5th. It is further adjudged, ordered, and decreed by the court that in the event either of the parties or all of them against whom a judgment is herein rendered shall fail or refuse to turn over to the clerk of this court the respective amounts herein decreed to be turned over to said clerk by each party within ninety days from this date, then and in such event execution or executions may issue in the name of all the plaintiffs, directed and delivered to the sheriff or other proper officer, commanding such officer to *am*ke the money thereon as on execution, provided that no execution shall issue against the said L. P. Harrison for the amount herein adjudged against the Farmers' and Merchants' bank or the Paris Exchange bank unless the said banks shall fail to pay into the hands of the clerk the respective amounts adjudged against them respectively within the ninety days herein provided, and if they fail to so pay it until executions have run therefor against said banks for the amount due from each and shall be returned unsatisfied and when collected pay it into the hands of said clerk, who shall keep it as the law requires him to keep money deposited with him as clerk, and that he safely keep it and have it forthcoming for final distribution under this decree and the further orders of the court or under its direction.

6th. It is further decreed by the court that the aggregate amount paid over to the clerk by the Farmers' and Merchants' bank and the Paris Exchange bank or collected from them or either of them on execution as herein provided, when paid into the hands of the clerk, shall be a credit *pro tanto* on the amount herein adjudged in the first adjudging clause of this decree against the defendant L. P. Harrison.

7th. It is further adjudged and decreed by the court that the three several mortgages or deeds of trust executed by the Lyons-Thomas Hardware Company to L. P. Harrison, dated the 9th day of November, 1889, are null and void and are invalid.

8th. The plaintiffs having dismissed as to the Baker Wire Company, and said Baker Wire Company, defendant, having filed herein an answer, electing to pursue its remedy against the Lyons-Thomas Hardware Company and L. P. Harrison in its sequestration suit against them for the recovery of property, being cause No. 4689 on the docket of this court, and the defendants and intervenors showing no cause of action against said Baker Wire Company, it is ordered that the said Baker Wire Company be dismissed and go hence without prejudice to its other suit by anything had or done in this suit or decree; and it is further adjudged that the intervenors, The Farmers' and Merchants' Bank, Joe Lyons, Julius P. Record, J. D. Thomas, N. H. Ragland, Charles I. Broad, T. J. Record, W. T. Gunn, and John C. Gibbons, take nothing by their intervention.

It is further adjudged and decreed by the court that the plaintiffs herein do have and recover of and from the defendants and intervenors herein judgment for all costs by them in this behalf incurred; for which they may have their execution.

And it is further adjudged and decreed by the court that the officers of the court recover from each party respectively all costs by them respectively incurred; for which execution may issue.

The defendants and intervenors and each of them, in open court, except to the conclusions of fact and the conclusions of law found by the court and the judgment here rendered, and each of them, in open court, give- notice of appeal to the supreme court of Texas.

(Record, p. 86.)

Findings of Law and Facts by the Court.

In District Court, Lamar County, Texas.

THE PERRY STOVE MFG. CO. *et al.*
vs.
THE LYONS-THOMAS HARDWARE CO. *et al.*, Def't-, and FARMERS' & MERCHANTS' BANK *et al.*, Intervenors.

The following are the findings of law and facts found by the court on the trial of the above-entitled cause:

1st. That the Lyons-Thomas Hardware Company was, on the 9th day of November, 1889, a trading corporation under and by virtue of the laws of Texas.

2nd. That on said day it was insolvent and unable to pay its debts, and that it then made and delivered to L. P. Harrison three several deeds of trusts or chattel mortgages, in which it conveyed to said L. P. Harrison, as trustee, all of its assets of every kind and description, whether real, personal, or mixed, including its notes, books and accounts, safe fixtures, &c., and delivered said property, together with the storehouse in which it had been doing business, to the said L. P. Harrison, in and by the term- of which deeds of trust and mortgages the said L. P. Harrison was authorized and empowered and he was directed to sell all of said property of every kind, and with the proceeds pay certain preferred creditors therein named, including the Farmers' and Merchants' bank, the Paris Exchange bank, L. P. Harrison, and certain indorsers and sureties on the notes of said Lyons-Thomas Hardware Company, which were preferred in said instruments, and among the said sureties were Joe Lyons, Julius P. Record, who, with one Pearcy Preston, were the members and stockholders in said "hardware company;" that there were some other creditors named as preferred creditors in said instruments, and that no other creditor was by the terms of said instruments to be entitled to receive anything on their debts until all said preferred debts were paid in full; that the amount of indebtedness due the Farmers' and Merchants' bank, according to said deeds of trust or mortgages, was $48,089.60; that the amount due to the Paris Exchange bank, as shown by said instruments, was $6,951.95, and the amount due to the said L. P. Harrison was over $1,500.00.

That by the terms of said instruments there were a few other pre-

ferred creditors named therein and a large number of other creditors holding a large amount of claims who were not preferred and who by the terms of said instruments were not entitled to receive anything on their respective debts until all the preferred creditors were paid in full out of the assets of "hardware company."

That the plaintiffs herein are non-preferred creditors of said "hardware company," and that their respective claims have been reduced to judgments, amounting to several thousand dollars, upon which nothing has been paid.

3rd. I find that the entire assets of said "hardware company" amounted to $60,306.57, and that its entire indebtedness amounted to over one hundred thousand dollars, and that it was entirely insolvent on the 9th day of November, 1889, the date at which said instruments were executed and delivered to L. P. Harrison, trustee.

4th. I find that when each and all of said deeds of trust or mortgages were executed the said Lyons-Thomas Hardware Company intended to cease doing business and did not intend to any longer carry out the objects and purposes for which it was created, and that it has not since carried on its business or attempted to do so, but the said L. P. Harrison has sold all of its assets of every kind and the amount received by him therefor was the sum of $60,306.57; that of this sum he paid over to the Farmers' and Merchants' bank on its preferred claim the sum of $43,812.45; that he has paid over to the Paris Exchange bank the sum of $6,951.95 on its preferred claim, and that he paid over to himself on his preferred claim the sum of $1,640.00 and refuses to pay anything on any other non-preferred debts, and that he yet has on hand $224.00, and that the entire proceeds of the entire assets of said hardware company *is* inadequate to pay all of the preferred claims.

5th. I find that the Farmers' and Merchants' bank, the Paris Exchange bank, and L. P. Harrison each received the money paid to them, respectively, of the proceeds of the assets of the Lyons-Thomas Hardware Company, with full notice of the claims and of the equities of the plaintiffs herein and of all their rights in the premises.

I find that the difference between the entire amount realized by said L. P. Harrison for the entire assets of said hardware company and the sum of the amounts retained by him and paid to the Farmers' & Merchants' bank and the Paris Exchange bank on his and their respective debts was expended by him in the preservation of said property and the sale and conversion of the same into money.

I therefore conclude, as a matter of law, 1st, that the said deeds of trusts or chattel mortgages executed and delivered by the defendant The Lyons-Thomas Hardware Company on the 9th day of November, 1889, to L. P. Harrison, trustee, in which said preferences were made, were not authorized by law, in that they attempted to prefer certain of its creditors to the exclusion of all the others, and that they were and are for that reason void and gave no valid preference to any of its creditors.

2nd. That the said L. P. Harrison and the Farmers' and Merchants' bank and the Paris Exchange bank ought to be required to pay over the money realized from the sale of the assets of said hardware com-

pany to the clerk of this court, to be distributed under the direction and orders of the court to those who may show themselves entitled to receive it or any part of it, and it is accordingly so adjudged.

Indorsed: No. 4691. Perry Stove Mfg. Co. *et al. vs.* Lyons-Thomas Hardware Co. *et al.*, defendants, and Farmers' & Merchants' Bank *et al.*, intervenors. Findings of law and fact by the court filed May 4, 1891. G. W. Martin, clerk district court, Lamar Co., Tex.

(Record, p. 190.)

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Appellants' Amended Assignment of Errors.

THE LYONS-THOMAS HARDWARE COMPANY *et al.*, Appellants,
vs.
THE PERRY STOVE MANUFACTURING COMPANY, Appellees.

For the reversal of this cause the appellants file this their amended assignment of errors as follows:

1st. The court erred in overruling the general demurrer filed by defendants and intervenors, W. T. Gunn, T. J. Record, John C. Gibbons, N. H. Ragland, C. I. Broad, J. D. Thomas, L. P. Harrison, The Paris Exchange Bank, and The Farmers' & Merchants' Bank, to the plaintiffs' 2nd amended original petition.

2nd. The court erred in overruling the special exception No. 1 filed by said defendants and intervenors to plaintiffs' second amended original petition, which said special exception is here referred to and made a part of this assignment.

3rd. The court erred in overruling the special exception No. 2 filed by said defendants and intervenors to plaintiffs' second amended original petition, which said special exception is here referred to and made a part of this assignment.

4th. The court erred in overruling the special exception No. 3 filed by said defendants and intervenors to plaintiffs' second amended original petition, which said special exception is here referred to and made a part of this assignment.

5th. The court erred in sustaining plaintiffs' demurrer to the answer and plea of intervention of the said W. T. Gunn, T. J. Record, John C. Gibbons, N. H. Ragland, C. I. Broad, J. D. Thomas, L. P. Harrison, and the Paris Exchange bank and the Farmers' and Merchants' bank.

6th. The court erred in permitting the witness Julius P. Record, over the objections of said defendants and intervenors, to state the various parties and corporations to whom the Lyons-Thomas Hardware Company was indebted, as shown by their bill of exceptions No. 1.

7th. The court erred in admitting in evidence, over the objections of said defendants and intervenors, the minutes of the district and county court and the docket of the justice court of precinct No. 1 of Lamar county, Texas, as shown by their bill of exception No. 2.

8th. The court erred in admitting in evidence, over the objections of said defendants and intervenors, judgments rendered against the Lyons-Thomas Hardware Company in favor of certain corporations named and shown in their bill of exceptions No. 3.

9th. The court erred in permitting the witness- L. P. Harrison and T. J. Record, over the objections of the defendants and intervenors, to state that the Farmers' & Merchants' bank had received $43,812.45 of the proceeds of the property mortgaged by the Lyons-Thomas Hardware Company, and the Paris Exchange bank had received $6,951.95 of such proceeds, as shown by their bill of exceptions No. 4.

10th. The court erred in finding as a conclusion of fact the Lyons-Thomas Hardware Company was entirely insolvent at the time it executed the deeds of trust and mortgages to secure the appellants on the 9th day of Nov., 1889, and in refusing to find the facts in regard thereto as requested by defendants and intervenors.

11th. The court erred in finding as a conclusion of fact that the entire assets of said Lyons-Thomas Hardware Company at the time it executed the mortgages and deeds of trust only amounted to $60,306.57, and in refusing to find the facts in regard thereto as requested by defendants and intervenors.

12th. The court erred in finding as a conclusion of fact that at the time said Lyons-Thomas Hardware Company executed said mortgages and deeds of trust it intended to cease doing business and did not longer intend to carry out the objects and purposes for which it was created, and in refusing to find the facts in regard thereto as requested by defendants and intervenors.

13th. The court erred in refusing to find upon the issues of fact proved, as requested by defendants and intervenors in writing, and numbering from 1 to 20, as shown by their bill of exceptions No. 5.

14th. The court erred in its conclusion of law that the mortgage and deeds of trust given by the Lyons-Thomas Hardware Company to L. P. Harrison, trustee, to secure defendants and intervenors in the payment of their debts *was* void, and that said Lyons-Thomas Hardware Company could not thereby create a valid preference.

15th. The court erred in rendering a judgment against L. P. Harrison for $57,529.44 or for any amount at all, because its evidence shows that the said Harrison was a trustee and the pleadings of the plaintiffs claimed judgment against him for waste and devestavit, and the court allowed and approved his accounts and found there was no devestavit, and the record shows that the money which came into his hands was paid out by him under the orders, judgment, and decree of the court.

16th. The court erred in rendering judgment against the Farmers' & Merchants' bank for the money it received on its debts, because there was no pleading to authorize such judgment and because, the debt of said bank being valid, the Lyons-Thomas Hardware Company had the right and the power to secure it.

17th. The court erred in rendering judgment against the Paris Exchange bank for the money it received on its debts, because there was no allegation in plaintiffs' pleadings to authorize such judgment

and because, the debt of said bank being valid, the Lyons-Thomas Hardware Company had the right and the power to secure such debt.

18th. The judgment of the court is contrary to law in this: The court should have held in any event that the Paris Exchange bank, the Farmers' & Merchants' bank, and L. P. Harrison were entitled to their *pro rata* in the distribution of the funds of said Lyons-Thomas Hardware Company, and if the said mortgages and deeds of trust were invalid by reason of the attempted preference, still the said banks and the said Harrison by the judgment of the court would have been entitled to retain their respective *pro rata* shares.

19th. The court erred in permitting the Baker Wire Company to withdraw from the case and in dismissing the case as to said Baker Wire Company after the cause had been submitted upon the law and the facts.

DUDLEY & MOORE,
MAXEY, LIGHTFOOT & DENTON,
Appellants' Counsel.

Indorsed: Perry Stove Manufacturing Co. *vs.* Lyons-Thomas Hardware Co. *et al.* Amended assignment of errors for appellants. Filed Feb. 25, 1892. G. W. Martin, clerk district court, Lamar county, Texas, by W. B. Johnson, dep.

(Record, p. 194.)

L. P. Harrison's Amended Assignment of Errors.

PERRY STOVE MANUFACTURING COMPANY
vs.
LYONS-THOMAS HARDWARE CO. *et al.*

And now comes appellant L. P. Harrison, trustee, and amends his original assignment of errors and here adopts the assignment of errors filed by his co-appellants and in addition thereto files this his separate assignment as follows:

1st. The court erred in overruling the demurrer of this appellant to the second amended original petition of plaintiffs, because it fully appears therefrom that the mortgages and deeds of trust executed by the Lyons-Thomas Hardware Company were good and valid and conferred upon the trustee full power and authority to sell said property and apply the proceeds to the payment of the debts therein mentioned, and that plaintiffs have no cause of action.

2nd. The court erred in overruling the first special exception of the trustee to the 2nd amended original petition, because the same does not show that plaintiffs have exhausted their remedies at law by judgment and execution and the return of the same uncollected.

3rd. The court erred in overruling the trustee's demurrer and special exception to said second amended original petition, on the ground that there is a misjoinder of causes of action, in this: There is an equitable cause of numerous creditors against the Lyons-

Thomas Hardware Company, a suit to recover against the alleged stockholders or members of said corporation amounts of unpaid stock, a suit for capital stock wrongfully transferred or misapplied, a suit for damages against the trustee for waste, devastavit, and misapplication of funds, and an alleged suit against the Farmers' & Merchants' and the Paris Exchange banks.

4th. The court erred in sustaining the demurrer and exception of plaintiffs to the answer of this defendant, striking out all of his answer, especially that part of said answer which sets up that intervenors and said trustee were *bona fide* creditors and mortgagees of the hardware company for a valuable consideration without notice, and that such mortgage was a prior mortgage, and that they (intervenors and L. P. Harrison, trustee) took possession of the mortgaged property without notice of any other mortgage or deed of trust, and that said property was sold by the trustee under the order of the court made in chambers.

5th. The court erred in its judgment and its findings of law and fact in this: That it refused to find for defendant, when *in* was fully shown that the debts secured by the mortgages were *bona fide* debts, and that the hardware company had a right to secure the same and in good faith did secure the same, and that such security was accepted in good faith and such trust faithfully executed by the trustee.

6th. The court erred in its judgment and in its finding of law and fact in this: That it was alleged and proved that this trustee was duly and legally appointed by the court as its trustee in the nature of a receiver, and gave bond and fully qualified as such and fully administered such trusts and paid over the money in strict compliance with the order and decree of the court before any judgment of plaintiffs and without objection from them, and the court refused to find upon this question at his request, but rendered its judgment against him for the same fund.

7th. The court erred in rendering judgment against this trustee for $52,529.44 — for any amount at all, because the evidence shows that he was a trustee appointed by the court under bond, and plaintiffs in their pleadings claimed judgment against him as such trustee for waste and devastavit, and the court on the trial allowed and approved his accounts and found there was no devastavit, and the evidence shows that the money which came into his hands was paid out by him under the order, judgment, and decree of the court.

8th. The court erred in refusing to find, at this appellant's request, that the Baker Wire Company had filed its sequestration suit against said trustee and sequestered $1,712.24 worth of said assets, and that said trustee had given his replevy bond therefor, and that Edward Miller & Co., L. Waterberry & Co., the Meriden Cutlery Co., and the Ferris Hame Co. were all suing him for the value of specific portions of said property and said suits are all still pending in the district court of Lamar county, Texas, and in giving plaintiffs judgment for all the assets without protecting said trustee against such suits.

9th. The court erred in dismissing this cause as to the Baker Wire

Company and in allowing them to pursue their separate sequestration suit against this appellant after rendering judgment against its own trustee or receiver for all of the assets in his hands or which have ever been in his custody.

Wherefore he asks that said cause as against him be reversed and dismissed.

DUDLEY & MOORE,
MAXEY, LIGHTFOOT & DENTON,
Counsel for L. P. Harrison, Trustee.

Indorsed: Perry Stove Manufacturing Co. *vs.* Lyons-Thomas Hardware Co. *et al.* Amended assignment of errors of L. P. Harrison, trustee. Filed Feb. 25, 1892. G. W. Martin, clerk district court, Lamar county, Texas, by W. D. Johnson, deputy.

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(Record, p. 228.)

Order of Supreme Court on Questions Certified.

LYONS-THOMAS HARDWARE COMPANY *et al.* *vs.* PERRY STOVE MANUFACTURING COMPANY *et al.* } No. 23. Certified Question from Second District.

Opinion delivered by Chief Justice STAYTON:

It is ordered by the court that a copy of the opinion herein delivered be certified to the court of civil appeals for the second supreme judicial district, and that said cause be there proceeded with in accordance with said opinion.

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(Record, p. 241.)

Judgment of the Court of Civil Appeals.

From District Court, Lamar County.

LYONS-THOMAS HARDWARE CO. *et al.* *vs.* PERRY STOVE MANUFACTURING CO. *et al.* } 184.

WEDNESDAY, *January* 31*st*, 1894.

Opinion of the court delivered by Mr. RAINEY, associate justice:

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was error in the judgment of the court below in not permitting all the creditors of the Lyons-Thomas Hardware Company to participate in the distribution of the funds of said company, it is therefore considered, adjudged, and ordered that the judgment of the court below be, and is now here, reformed as to the distribution of said funds as follows:

It is ordered, adjudged, and decreed that the money realized from

the sale of the assets of the Lyons-Thomas Hardware Company be administered by the district court of Lamar county and paid *pro rata* to all the creditors of said company desiring to share in the distribution thereof, whether parties to this suit or not; and it is further considered, adjudged, and ordered that the judgment of the court below be in all other respects *be* in all things affirmed; that the appellants, The Lyons-Thomas Hardware Company, Joe Lyons, Julius P. Record, W. T. Gunn, T. J. Record, Jno. C. Gibbons, N. H. Ragland, and C. I. Broad, J. D. Thomas, The Paris Exchange Bank, L. P. Harrison, and The Farmers' and Merchants' Bank and J. D. Crook and D. B. Webster, their sureties on appeal bond, pay all costs in this behalf expended, and this decision be certified to the court below for observance.

(Chief Justice Lightfoot disqualified and not sitting.)

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(Record, p. 297.)

Judyment Supreme Court.

From Lamar County, Fifth District.

LYONS-THOMAS HARDWARE CO. *et al.*
vs.
PERRY STOVE MANUFACTURING CO. *et al.* } No. 145.

Opinion delivered by Associate Justice BROWN:

This cause came on to be heard on writ of error to the court of civil appeals for the fifth supreme judicial district, and the original transcript in said cause being before the court, as well as the transcript showing the proceedings had in said court of civil appeals, and these having been duly considered, because it is the opinion of this court that there was no error in the judgment of the court of civil appeals in reforming and affirming the judgment of the district court of Lamar county, it is therefore considered, adjudged, and ordered that the judgment of said court of civil appeals be affirmed, and that the judgment of the district court of Lamar county so reformed be affirmed, the judgment of said court of civil appeals being as follows: "This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was error in the judgment of the court below in not permitting all the creditors of the Lyons-Thomas Hardware Company to participate in the distribution of the funds of said company, it is therefore considered, adjudged, and ordered that the judgment of the court below be and is now here reformed as to the distribution of said funds, as follows: It is ordered, adjudged, and decreed that the money realized from the sale of the assets of the Lyons-Thomas Hardware Company be administered by the district court of Lamar county, and paid *pro rata* to all the creditors of said company desiring to share in the distribution thereof, whether parties to this

suit or not; and it is further considered, adjudged, and ordered that the judgment of the court below be in all other respects *be* in all things affirmed." * * * It is further ordered by this court that the funds in the hands of the district court of Lamar county, belonging to the Lyons-Thomas Hardware Company, be distributed among all the creditors of the said firm according to the amount of the several claims, and that said district court shall give proper notice to all said creditors to present their claims for allowance and distribution; that the plaintiffs in error, The Lyons-Thomas Hardware Company, Joe Lyons, Julius P. Record, W. T. Gunn, T. J. Record, John C. Gibbons, N. H. Ragland, C. I. Broad, J. D. Thomas, The Paris Exchange Bank, The Farmers' & Merchants' Bank, L. P. Harrison, and their sureties, J. D. Crook, D. B. Webster, W. B. Woodard, P. W. Harrison, Geo. A. Titterington, John Martin, D. H. Scott, H. A. Bland, T. D. Craig, and W. B. Aiken, pay all costs in this behalf expended in this court, in the court of civil appeals, and in the district court, and this decision be certified to the district court for observance.

(Record, p. 299.)

Motion for Rehearing.

LYONS-THOMAS HARDWARE CO. *et al.*, Appellants or Plaintiffs in Error,
vs.
PERRY STOVE MANUFACTURING CO. *et al.*, Appellees or Defendants in Error.

Now come the appellants or plaintiffs in error, to wit, The Farmers' & Merchants' Bank, The Paris Exchange Bank, L. P. Harrison, The Lyons-Thomas Hardware Company, Joe Lyons, Julius P. Record, J. D. Thomas, N. H. Ragland, Charles I. Broad, T. J. Record, W. T. Gunn, John C. Gibbons, and each of them, and move the court to grant them a rehearing in this cause upon the following grounds, to wit:

First. The court erred in adhering to its former opinion on the certified question in this cause, and thereby holding that an insolvent corporation could not make a valid chattel mortgage with preferences to a portion of its creditors, and said holding is not conclusive for the reasons, 1st, that the property rights of plaintiffs in error under said chattel mortgage were determined by this court on said certified question without any lawful or constitutional authority.

2nd. The act of the legislature of 1893 authorizing such question to be certified by the court of civil appeals to this court is unconstitutional and void, in that it violates section 19 of the bill of rights of the constitution of Texas, which provides that no citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised except by due course of the law of the land.

3rd. Said act of the legislature of the State of Texas is contrary

to the 14th amendment of the Constitution of the United States of America, which provides, among other things, that "no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law," in this, that the plaintiffs in error having appealed this case to the supreme court of the State of Texas prior to the law creating the courts of civil appeals, and prior to the act of 1893, authorizing questions to be certified to this court by the courts of civil appeals, they were entitled to a hearing and determination of this case on appeal upon the whole record before a tribunal authorized by the constitution to pass on the same according to the rules and principles which had been established in our system of jurisprudence for the protection and enforcement of private rights.

4th. The said act of the legislature of Texas of 1893 authorizing questions to be certified by the court of civil appeals to the supreme court of this State does not give the parties to the suit in which the questions are certified any right to be heard as to what shall be contained in the certified questions, nor is there any provision by which they may contravert or correct the certificate of the record, nor does it provide that the party shall be heard on the certified question in the supreme court of the State of Texas, nor is there any provision in said act or in the rules of the supreme court of the State requiring so much of the record of said case filed in the court of civil appeals as relates to and is pertinent to the very question to be decided by the supreme court to be laid before the supreme court, and because when the supreme court decides said question or questions the court of civil appeals, on final adjudication, is bound to decide in accordance with the decision of the supreme court upon the issue submitted, so that the final adjudication in the court of civil appeals is partly based on its own judgment and partly in obedience to the mandate of the supreme court, thereby depriving the court of civil appeals of the exercise of its own untrammelled judgment, thereby defeating its appellate jurisdiction. It is therefore obnoxious to the 14th amendment of the Federal Constitution.

5th. The certified question in this case by the court of civil appeals, upon which the question of the validity of the chattel mortgage given by the Lyons-Thomas Hardware Company to secure plaintiffs in error was determined and held conclusive by this court, contains no part of the record, nor does it show how the question arose or the facts upon which it arose; it is a mere abstract question, not supported by the evidence in the record, and was not necessary to the determination of the cause, as shown by the record.

6th. The said act of the legislature of Texas of 1893 is unconstitutional and void, because it destroys the appellate jurisdiction of the courts of civil appeals as fixed by the amendment to article 5, section 3, of the constitution of Texas, and authorizes said courts of civil appeals in any and all cases pending before said courts to certify any and all questions of law arising in said cases to the supreme

court for decision, and, without exercising their appellate jurisdiction provided by the constitution, by deciding the cases, said courts are simply to retain them for adjudication in accordance with the decision of the supreme court on the certified question.

Second. The court erred in sustaining the judgment rendered by the court below against the Farmers' & Merchants' bank and the Paris Exchange bank, and in holding that the evidence of the payments by Harrison to the said banks or either of them was properly admitted in evidence, because there were no pleadings in the record to authorize the admission of such evidence, and there are no pleadings in the record to authorize any judgment whatever against said banks or either of them. The money paid over to said banks or either of them by Harrison under said chattel mortgage could not be taken from them or either of them except by due course of law—that is to say, by a suit instituted and conducted in accordance with the prescribed course of procedure for determining the title to property, and there being no allegation in the pleadings of the defendants in error that said banks or either of them had received or were in the possession of any of said money arising from the sale of the property of the Lyons-Thomas H'dw're Co. or were in possession of any of the property of the Lyons-Thomas Hardware Company, but, on the contrary, the pleadings of the defendants in error having alleged affirmatively that no payments had been made by the trustee, Harrison, to said banks, and that the trustee, Harrison, had wasted and converted said money, the said judgment against said banks is without due process of law and contrary to the 14th amendment of the Constitution of the United States.

Third. The judgment against the Paris Exchange bank is without due process of law and void because said bank did not intervene nor voluntarily make itself a party to this suit, nor was it made a party by the original bill filed by the defendants in error on November 20th, 1889, but was made a party to this suit by the first amended original petition of defendants in error filed August 7th, 1890, after it had received the money under its security provided by the chattel mortgage, and this money could not be taken from it except by due process of law, which means the institution and conduct of a suit in accordance with the prescribed course of procedure in determining the title to said money. See Baker *vs.* Kennedy, 53 Tex., 200; S. C., 59 Tex., 150; 1 Story's Eq., sec. 533; 2 Story's Eq., sec. 1258; *In re* Hatch, 43 N. Y. Super. Ct., 91.

Fourth. Because the judgments rendered against the Farmers' & Merchants' bank, the Paris Exchange bank, and L. P. Harrison, of date May 4, 1891, as shown by the record, are adjudged to bear 8 % interest from their dates, when by the act of the legislature of the State of Texas, approved April 13, 1891 (see acts of regular session of 22nd legislature, 1891, p. 87), said judgments should only bear 6 % interest per annum. While this is not assigned as error it is fundamental.

Fifth. The court erred in sustaining the judgments against the Farmers' & Merchants' bank, the Paris Exchange bank, and L. P. Harrison as rendered by the court below, because an inspection of

the record will show that said judgments requires the two banks and Harrison to bring into court every dollar they received, with 8 % interest on the whole amount from the time they received it, thus requiring them to pay interest on their *pro rata* part, which they are entitled to retain under the judgment of the court of civil appeals as reformed.

Sixth. The court erred in holding that simple contract creditors could maintain this suit, and in holding that the amended petition upon which the suit was tried alleged affirmatively that the plaintiffs in the bill were judgment creditors and had exhausted their remedy at law, the only allegation in the bill on this subject being by reference to an exhibit attached to said bill. See Cassady *vs.* Anderson, 30 Texas, and same case, 53 Texas.

Seventh. The court erred in holding that all the beneficiaries in the deeds of trust were not necessary parties to this suit, and that the trustee in this character of suit was the only necessary party defendant, because this was a suit in equity by strangers in relation to or to recover of the trustee the property (or its proceeds) embraced in the chattel mortgage and deeds of trust. In such cases the *cestui que trust.* must be made parties to represent their interest. The trustee was not an agent for the purpose of defending the property against the adverse claims of third persons without the knowledge of the real owners or beneficiaries.

We would be glad if the court would examine the following authorities:

Perry on Trusts, 4th ed., vol. 2, sec. 873.
Holland *vs.* Baker, 3rd Hare, 72.
Sprague *vs.* Tyson, 44 Ala., 338.
White *vs.* Haynes, 33 Indiana, 540.
Harris *vs.* McBane, 66 N. C., 334.
Dunn *vs.* Seymour, 3rd Stock't, 220.
Bifield *vs.* Taylor, 1st Moll., 198.
Adams *vs.* St. Leger, 1st B. & B., 184.
Vernon *vs.* Blackerly, 2nd Atk., 145.
1st Daniels' Chancery Practice, 4th Am. ed., 220, 221, 256.
Story's Equity Pleadings, sec. 216.

Eight. The court erred in sustaining the judgment of the court below rendered against Harrison, receiver of the said court, because Harrison was the officer of the court. His possession was the possession of the court; he was subject to the order of the court; he was but the arm of the court, and no judgment could be rendered against him for obeying the order of the court. If the order was a nullity, the property or money which the court ordered him to turn over could by proper proceedings be followed and recovered from the parties receiving the same, but he could not be held personally liable for the money which the court, through him, turned over to said parties. It would be the same as the court holding itself liable for said money. We would respectfully ask the court to examine the following authorities:

Keene *vs.* Gaehle, 56 Md., 343.
Beach on Receivers, sec. 304.
Holcombe *vs.* Johnson, 27 Minn., 353.
How *vs.* Jones, 60 Iowa, 70.
In re Howe Provident Safety Fund Assc. (Supreme Court), 15 N. Y. Supp., 211.
Union Book Case, 37 N. J. Eq., 420.
Powers *vs.* Laughridge, 38 N. J. Eq., 396.
Manning *vs.* Monaghan, 23 N. Y., 544.
Wildy *vs.* Baker, 14 Allen (Mass.), 349.
Drake *vs.* Goodrich, 6 Blatchford, U. S., 151.
Knight *vs.* Lord Plymouth, 3 Atk., 480.
Perry on Trust (4th ed.), sec. 924, and authorities cited in note 7.

The appellees' or defendants' in error counsel are Messrs. Hale & Hale and T. S. Hill, who reside in Paris, Lamar county, Texas.

Wherefore appellants or plaintiffs in error pray that they be served with a copy of this motion, and on hearing hereof they pray that a rehearing in this case be granted, and that the judgment of the court of civil appeals and the district court of Lamar county be reversed and rendered or reversed and remanded, as to this court may seem just.

DUDLEY & MOORE,
S. B. MAXEY,
DENTON & LONG,
Att'ys for Appellants or Plaintiffs in Error.

Indorsed: Motion 110. Cause No. 145. Lyons-Thomas Hdw. Co. *et al.*, plaintiffs in error, *vs.* Perry Stove Mfg. Co. *et al.*, defendants in error. Motion for rehearing. Overruled. Filed in supreme court June 21, 1894. Chas. S. Morse, clerk. Copy and precept issued June 22, 1894.

(Record, p. 305.)

Order Overruling Motion.

LYONS-THOMAS HARDWARE CO. *et al.* *vs.* PERRY STOVE MFG. CO. *et al.* } Mo. No. 110. No. 145. From Lamar Co., Fifth District.

This day came on to be heard the motion of the plaintiff- in error for a rehearing, and, the same having been duly considered, it is ordered that said motion be overruled; that the plaintiffs in error, The Lyons-Thomas Hardware Co. *et al.*, and their sureties pay all costs incurred on this motion.

(Overruled June 6th, 1895.)

* * * * * * *

(Record, p. 344.)

In the Supreme Court of the State of Texas.

LYONS-THOMAS HARDWARE COMPANY *et al.*, Appellants or Plaintiffs in Error,
vs.
THE PERRY STOVE MANUFACTURING COMPANY *et al.*, Appellees or Defendants in Error.
} No. 145.

Assignment of Error.

Now comes the appellants or plaintiffs in error, The Lyons-Thomas Hardware Company, The Farmers' & Merchants' Bank, The Paris Exchange Bank, L. P. Harrison, Joe Lyons, Julius P. Record, J. D. Thomas, C. I. Broad, N. H. Ragland, W. T. Gunn, T. J. Record, and John C. Gibbons, each and all by their counsel, and say that in the record and proceedings in the above entitled and numbered cause there is manifest error in this, to wit:

I.

The supreme court of the State of Texas erred in denying the Lyons-Thomas Hardware Company, one of the plaintiffs in error, the same right, privilege, and immunity specially claimed and set up of disposing of its property, either absolutely or as security for the payment of its debts, which an individual or any private corporation, solvent or insolvent, has under the law and statute of the State of Texas, and in holding and deciding the mortgage and deeds of trust executed by the Lyons-Thomas Hardware Company to L. P. Harrison, trustee, on the 9th day of November, 1889, to secure certain creditors therein named to be invalid because of the attempted preference, for the reason that under the statutes, laws, and the decisions of the State of Texas an individual, though insolvent and ceasing to do business, has the right to prefer by mortgage or deed of trust one or more of his creditors to the exclusion of others as at common law, and the denial by the supreme court of Texas of the same right to the Lyons-Thomas Hardware Company, a private corporation incorporated under the laws of Texas, is in violation of the 14th amendment of the Constitution of the United States, which provides, among other things, that "No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

II.

The said supreme court of the State of Texas erred in denying the said plaintiff in error, The Lyons-Thomas Hardware Company, and those claimed under it the right, privilege, and immunity expressly given to all corporations under the statutes of Texas of ex-

ecuting a mortgage or pledge of its property to secure the payment of its debts, and in deciding that said statute of Texas applied only to solvent corporations who were continuing the business for which they were organized, for the reason that the statutes of Texas, R.S., arts. 575, 577, expressly authorize all corporations created under the laws of Texas to mortgage or pledge their property to secure their debts without qualification or exception, and the said Lyons-Thomas Hardware Company, though insolvent, had the same right, privilege, and immunity, and entitled to the same protection under the statutes of Texas in the disposition of its property to secure the payment of its debts that is given to any corporation under such laws of Texas, and the denial of such equal right by the supreme court of the State of Texas is contrary to and in violation of the 14th amendment of the Constitution of the United States.

III.

The said supreme court of the State of Texas erred in its decision in favor of the validity of the act of the legislature of the State of Texas entitled "Courts of civil appeals, regulating the certifying of questions at issue to the supreme court for adjudication, approved May 2nd, 1893;" and erred in determining the rights of plaintiffs in error upon the certified questions in pursuance of said act, because said act of the legislature of the State of Texas was passed after plaintiffs in error had perfected their appeal to the supreme court of Texas; and they were entitled to a hearing and decision of their case upon the whole record before a tribunal authorized by the constitution and laws of Texas to pass on the same according to the rules and principles which had been established in the system of jurisprudence of Texas for the protection and enforcement of private rights.

The questions certified are abstract propositions of law, not supported by the evidence in the case, in this: the evidence shows that at the time the Lyons-Thomas Hardware Company executed the chattel mortgage to secure the other plaintiffs in error it was still a going concern; that it was not hopelessly insolvent; it did not then contemplate ceasing to do business; its officers, managers, and directors believed it would be able to arrange its matters and go ahead; no part of the record or the fact contained in the record were sent up or made part of the certified questions. The said act of 1893 does not give the parties to the suit any right to be heard, either upon the certified questions or upon what shall be contained in the certified questions, or to controvert or correct the certified questions, and the law makes no provision for the record or any part of it accompanying the certified question, and provides that the decision of the supreme court on its certified questions is final and binding on the court of civil appeals, thereby determining and taking away the property rights of plaintiffs in error without due process of law, in violation of the 14th amendment of the Constitution of the United States.

IV.

The said supreme court of the State of Texas erred in sustaining the judgment against the Farmers' & Merchants' bank and the judgment against the Paris Exchange bank as rendered by the district court of Lamar county, Texas, and as reformed and affirmed by the court of civil appeals for the 5th supreme judicial district of Texas, because under the pleadings no judgment whatever for money could be rendered against either of said banks. There was no allegation in the pleadings that either of said banks had ever received any money or property of the Lyons-Thomas Hardware Company, or that either of said banks were then or ever had been in possession of any of the property or assets of the Lyons-Thomas Hardware Company, and no evidence was admissible to prove the payments to said banks by Harrison. The money which the said banks had received on their respective debts, under the chattel mortgage, could not be taken from them or either of them except by due course or process of law—that is to say, by a suit instituted and conducted in accordance with the prescribed course of procedure for determining the title to property. The money judgments against said banks, respectively, is without due process of law and violates the 14th amendment to the Constitution of the United States.

Wherefore plaintiffs in error, by their said counsel, pray that the said judgment of the supreme court of the State of Texas be reversed, annulled, and held for naught.

J. G. DUDLEY,
W. S. MOORE,
B. H. DENTON,
Attorneys for Plaintiffs in Error,
Lyons-Thomas Hardware Co. et al.

The foregoing assignment of error was this day presented to me with the petition for writ of error.

This the 29th day of July, A. D. 1895.

R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

Indorsed: No. 145. The Lyons-Thomas Hardware Co. *et al.*, plaintiffs in error, *vs.* The Perry Stove Manufacturing Co. *et al.*, defendants in error. Assignment of error and prayer for reversal. Filed in supreme court of Texas August 3rd, A. D. 1895. Chas. S. Morse, clerk.

* * * * * * *

Additional Extracts from Transcript of Record.

THE LAW ASSOCIATION OF PHILADELPHIA

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 717.

THE LYONS-THOMAS HARDWARE COMPANY, THE FARMERS' AND MERCHANTS' BANK, THE PARIS EXCHANGE BANK, ET AL., PLAINTIFFS IN ERROR,

vs.

THE PERRY STOVE MANUFACTURING COMPANY, SCHOVERLING, DALY & GALES, MERCHANT & CO., ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED AUGUST 24, 1895.

(16,007.)

(16,007.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

INDEX.

	Page.
Order on demurrer	1
Bill of exceptions, No. 4, of W. T. Gunn *et al*	1
File-mark on record in supreme court of Texas	2
Orders in supreme court of Texas	2
Questions certified to supreme court of Texas	3
Orders in supreme court of Texas	3
Opinion of supreme court on questions certified	4
Opinion of court of civil appeals for the fifth district	20
Petition for writ of error	29
Opinion of supreme court on hearing on writ of error	39

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 19, 1895.

(Record, page 80.)

Order on Demurrer.

PERRY STOVE MFG. CO. *et al.*
vs.
LYONS-THOMAS HARDWARE CO. *et al.* } No. 4691.

APRIL 9, 1891.

On this day came on to be heard the demurrer and special exceptions of the defendants and intervenors, W. T. Gunn, T. J. Record, Jno. C. Gibbons, N. H. Ragland, C. I. Broad, J. D. Thomas, L. P. Harrison, The Paris Exchange Bank, and The Farmers' and Merchants' Bank, in this case to the petition of the plaintiffs, and, after hearing argument thereon, the court orders that said demurrer and special exceptions be overruled; to which judgment and ruling the said defendants and intervenors excepts in open court; also on this day came on to be heard the demurrer and special exceptions of the plaintiffs to the plea of intervention and answer of the defendants and intervenors, W. T Gunn and others, and, after hearing argument and being fully advised, the court adjudges said plea of intervention & answer of said defendants and intervenors insufficient in law, and orders that said demurrer and special exceptions to the said answer and plea of intervention be, and the same are hereby, in all things sustained; to which judgment and ruling the said defendants and intervenors except in open court.

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(Record, page 94.)

W. T. Gunn et al. Bill of Exception No. 4.

THE PERRY STOVE CO. *et al.*
vs.
LYONS-THOMAS HARDWARE CO. *et al.*

Be it remembered that on the trial of the above-entitled cause the plaintiffs introduced as witness one L. P. Harrison and one T. J. Record, by whom plaintiffs proposed to prove that the defendants The Paris Exchange Bank and The Farmers' & Merchants' Bank had received about $48,000.00 of the proceeds arising from the sale of the property of Lyons-Thomas Hardware Co. that had been mortgaged by said hardware company to secure said banks, which evidence was objected — by said Paris Exchange bank and said Farmers' & Merchants' bank and by intervenors W. T. Gunn, John C. Gibbons, N. H. Ragland, C. I. Broad, T. J. Record, L. P. Harrison, and J. D. Thomas on the grounds that there was no allegations in plaintiffs' petition that said banks or either of them had received a dollar of said money; on the contrary, the plaintiffs' petition alleges that the trustee, Harrison, had wasted, misapplied, and converted said money; that the evidence sought to make said banks

liable for certain money without any allegation in the petition that said money had gone into the hands and been received by said banks, which objections were overruled by the court, and the witness Harrison was permitted to state that he paid over to Maxey, Lightfoot & Denton, attorneys for the Farmers' & Merchants' bank, out of the proceeds of the mortgaged property of the Lyons-Thomas Hardware Co. $43,812.45, and that he paid over to T. J. Record for the Paris Exchange — out of said proceeds $6,951.95, and the witness Record was permitted to state that he paid over said money received by him to the Paris Exchange bank; to which ruling of the court the said Paris Exchange bank, the said Farmers' & Merchants' bank, and the intervenors W. T. Gunn *et al.* then and there excepted, and here tender this their bill of exceptions and ask that the same be allowed by your honor and filed as a part of this cause.

Examined and allowed.

E. D. McCLELLAN,
Judge of 6th District of Texas.

Indorsed: The Perry Stove Co. *et al. vs.* Lyons-Thomas Hardware Co. *et al.* W. T. Gunn *et als.*' bill of exceptions No. 4. Filed April 18, 1891. G. W. Martin, clerk district court, Lamar Co., Texas.

* * * * * * *

(Record, page 200.)

Indorsed: No. 8462. Lyons-Thomas Hardware Co. *et al.*, appellant-, *vs.* The Perry Stove Mfg. Co. *et al.*, appellee-. From district court of Lamar county. Applied for by Maxey, Lightfoot & Denton, of counsel for appellants, on the 4th day of June, 1891, and delivered to Maxey, Lightfoot & Denton on the 27th day of February, 1892. G. W. Martin, clerk of the district court of Lamar county, by W. B. Johnson, deputy. Filed in supreme court, at Austin, the 23rd day of May, 1892. Chas. S. Morse, clerk, by F. T. Connerly, deputy.

* * * * * * *

(Record, page 202.)

Orders in Supreme Court.

May 26, 1892.—Set for June 10th.
June 10th, 1892.—Submitted on briefs of both parties.
June 25th, 1892.—Continued.
October 3rd, 1892.—Transferred to the court of civil appeals for the 2nd supreme judicial district.

(Record, page 202.)

Questions Certified to the Supreme Court from 2nd Judicial District.

LYONS-THOMAS HARDWARE COMPANY *et al.*, Appellants, *vs.* PERRY STOVE MANUFACTURING COMPANY *et al.*, Appellees.	No. 392. Appeal from the District Court of Lamar County.

To the honorable supreme court:

In view of the commercial importance of the questions as well as the magnitude of the pecuniary interests involved, we deem it proper to certify for decision the controlling issues of law arising in the above suit, to wit:

1. Whether or not a preferential deed of trust executed by a private trading corporation (chartered in July, 1884, under general law) after it has become insolvent and consequently ceased to carry on its business, without any intention of renewing the enterprise, is void as against the unsecured creditors of such corporation.

2. If a private corporation under such circumstances has the same power to prefer its creditors as an individual, whether such preferential deed is void in law because of the fact that the stockholders, directors, and other officers of the corporation who execute it in the name of the corporation are liable as sureties and endorsers on the preferred claims.

We herewith transmit the briefs and printed arguments of the counsel upon the questions involved, to which reference is made for a fuller statement of the issues here certified.

B. D. TARLTON,
Chief Justice Second Supreme Judicial District.

Indorsed: No. 23. Lyons-Thomas Hardware Co. *et al.*, appellants, *vs.* Perry Stove Manufacturing Co. *et al.*, appellees. Certificate from court of civil appeals, second supreme judicial district, to supreme court of the State of Texas. Filed in supreme court May 8th, 1893. Chas. S. Morse, clerk, by F. T. Connerly, deputy.

(Record, page 203.)

Orders in Supreme Court.

May 11th, 1893.—Set for argument on 25th inst.

May 25th, 1893.—Submitted on briefs and oral argument for both.

November 16th, 1893.—Questions certified answered; opinion to be certified.

(Record, page 203.)

Opinion of Supreme Court on Certified Questions.

LYONS-THOMAS HARDWARE COMPANY *et al.* *vs.* PERRY STOVE MANUFACTURING COMPANY *et al.* } No. 23. Certified Questions from Second District.

The questions submitted by the court of civil appeals for decision are:

"1. Whether or not a preferential deed of trust executed by a private trading corporation (chartered in July, 1884, under general law) after it has become insolvent and consequently ceased to carry on its business, without any intention of resuming the enterprise, is void as against the unsecured creditors of such corporation."

"2. If a private corporation under such circumstances has the same power to prefer its creditors as an individual, whether such preferential deed is void in law because of the fact that the stockholders, directors, and other officers of the corporation who executed in the name of the corporation are liable as sureties and indorsers on the preferred claims."

Both questions present a case in which, on account of insolvency, the corporation had ceased to carry on business and had no intention at any time to resume when the instrument was executed through which preference was intended to be given.

The corporation was one having no powers other than such as are given by the laws of this State regulating incorporation under the general law, which of course will embrace powers, although not expressly given, that are necessary to the exercise of those which are.

It is contended, however, that such corporations have all the powers to give preferences which a person has, so long as the corporate existence continues, unless such power is denied by the common law or by the statutes of this State, and in support of this proposition reference is made to the opinion in case of Rishe *vs.* Ashbury Railway Carriage Co., 9 L. R. Exch., 263, in which the court was considering the powers conferred on corporations created under general acts of Parliament.

In the course of the opinion, referring to the case of "Sutton's hospital" (10 Coke, 30), it was said that was "an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself and to deal with its property as a natural person might deal with his own; and, further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind the law. * * * I take it that the true rule of law is that a corporation at common law has, as an incident given by law, the same power to contract and subject to the same restrictions that a natural person has."

The question involved in that case was whether a certain transac-

tion was *ultra vires*, and its solution depended on the question whether corporations incorporated under the general law had the same powers as what may be termed common-law corporations.

On appeal to the House of Lords, it was held that a company created a corporation under the general law providing for voluntary incorporation was not a corporation possessed of inherent common-law rights, but was limited to the powers properly embraced under the law in the memorandum of association. Railway Carriage Co. *vs.* Riche, 7 English & Irish Appeals, 633.

The English acts regulating incorporation, as do the acts in force in this State on that subject, prescribe the powers corporations organized under them may exercise, and it ought to be deemed settled law that they have only such powers as the acts under which they are created confer upon them. Attorney Gen'l *vs.* Great Northern R'y Co., 1 Drew & Sm., 154; Eversfiel *vs.* Railway Co., 3 De G. & J., 285; Railroad Co. *vs.* Steamboat Co., 107 U. S., 100; Thomas *vs.* Railroad Co., 101 U. S., 81.

In case last cited it was contended, as in this, that a corporation created as suggested in the questions submitted may do any act not expressly or impliedly prohibited by its charter, as might corporations at common law, but, in reply to this, it was said, "We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others."

In Head *vs.* Insurance Co., 2 Cranch, 127, it was said, "An individual has an original capacity to contract and bind himself in such manner as he pleases, * * * but with those bodies which have only a legal existence it is otherwise. The act of incorporation is to them an enabling act; it gives them all the power they possess, it enables them to contract."

In Davis *vs.* Railroad Co., 131 Mass., 259, it was said that a corporation "is not vested with all the capacities of a natural person or of an ordinary partnership, but with such only as its charter confers," and it may be doubted if the English decisions assert any other rule except as to corporations existing by prescription, whose existence as well as powers must be determined by long and uninterrupted exercise of corporate franchise. If the power thus used be for sufficient length of time as unrestricted in business as is that of a natural person the same reason exists for presuming that a grant of such power was at some remote period made as for presuming the existence of a grant of corporate franchise from its exercise for a great number of years.

It is probably true that English courts, in speaking of "corporations by the common law," refer only to those that have exercised

corporate powers from time immemorial, and it may be safely assumed that no mere trading corporation was ever thus classified.

Although requested to do so, if possible, counsel have been unable to furnish any decision by an English court except the one before referred to, which, as we have seen, was expressly overruled, in which it was held that a corporation created under the acts of Parliament regulating the formation and business of companies with corporate powers had any such powers as are here claimed for trading corporations created under the general laws of this State, and in view of the learning and industry of counsel we feel authorized to conclude that no such decision exists.

Whether such transactions as are set out in the questions propounded are consistent with rules recognized by courts of law as well as by courts of equity and by them enforced for the preservation of rights and redress of wrongs will be considered hereafter.

The broad proposition that a corporation created under the general laws of this State may do any act in reference to its property which a natural person may do with his is expressly negatived by the statute.

The memorandum of association, termed by the statute the "charter," is required to state "the purpose for which it is formed." R. S., 567.

This requirement is not solely that evidence may be thus furnished that the company is one intending to pursue a business for which the statute permits incorporation, but it is also intended for the protection of those who may become stockholders or creditors who are entitled to know in what business the corporation may engage, for without this they cannot know the extent of its powers nor the hazards to which they may be legally exposed.

The statute further provides that "No corporation created under the provisions of this title shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the objects of its creation." R. S., 389.

The objects of its creation are none other than such as are named in the charter. A natural person may make any disposition of his property not forbidden by law and may make any contract lawful within itself, but, under the plain terms of the statute referred to, a private corporation has no such power.

The statute enumerates the powers of private corporations existing under it, and they will be here noticed.

It declares that they shall have power "to hold, purchase, sell, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require, and also to take, hold, and convey such other property, real, personal or mixed, as shall be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due or belonging to the corporation." R. S., 575.

No such restrictions upon the power of natural persons to acquire, hold, or dispose of property exist, and the manifest purpose of this statute was not so much to confer power on such corporations to hold, purchase, sell, or mortgage property necessary for the

proper transaction of the business named in the charter as to restrict the power of corporations to hold, buy, sell, or mortgage, subject to one exception, to such property as may be reasonably necessary to the legitimate business of the particular corporation, for without such an express grant of power the incorporation of a company with authority to carry on a specified business would carry with it power to hold, purchase, sell, mortgage or otherwise convey property necessary to that business.

Power to hold, purchase, and sell property would be absolutely necessary to the business of any trading corporation, and power, through mortgage or like conveyance, to acquire means with which to purchase property necessary to carry on the business would also exist.

It will be observed that the powers mentioned in the statute are authorized to be exercised in relation to such property "as the purposes of the corporation shall require," and they are all powers ordinarily necessary to be exercised while a business is in active operation with a view to obtain the results contemplated when a corporation is created, and the exercise of some of them, as the powers to hold and purchase such property as the business of the corporation may require, would be necessary or permissible, looking to the rights of stockholders and creditors, only when the business was being carried on.

If a corporation be created with power to manufacture cotton or woolen goods, its power to buy and hold raw material while the business was carried on would be clear; but suppose such a corporation to become insolvent and on that account to cease business with intent never to resume it, would it be contended that it had power to buy and hold wool or cotton for purposes of speculation? The statute answers the question.

Some of the powers mentioned, however, may be as advantageously used in winding up the affairs of a corporation as in carrying it on, and these are the powers to sell, mortgage, and otherwise convey, but it must be kept in mind that the exercise of these powers, if we look alone to the statute under consideration as their source, is authorized only in reference to such property "as the purposes of the corporation require" to be sold, mortgaged, or otherwise conveyed.

If these powers stood alone it ought to be held that they might be exercised whenever necessary or advantageous to sell, mortgage, or otherwise convey, as in winding up the affairs of a private corporation; but standing in connection as they do with powers relating to the same property, which can be exercised upon such property only when it is necessary to carry on the corporate business then continuing, it may be doubted if the statute under consideration has any application to the winding up of the affairs of an insolvent corporation that has ceased to do business.

If by the word "purposes" be meant the business or occupation, in all its phases, which the corporation, by its charter, is empowered to pursue, as is meant by the word "purpose" in that part of the statute requiring "the *purpose* for which it is formed" to be stated in the charter, then it is evident that the statute has application

only to powers to be used while the business for which the corporation was given existence is carried on.

The power of a trading corporation to sell or to mortgage property to raise means to pay its debts during its active life or after it has become insolvent and ceased business is not controverted, but that is not the immediate question under consideration, for the present inquiry is, does the statute now under consideration, as claimed, expressly or by necessary implication confer on a corporation circumstanced as was the hardware company power to make the conveyance in question?

If such a power existed we are of opinion that it must be found elsewhere.

The statute further provides that private corporations have power "to enter into any obligation or contract essential to the transaction of its authorized business." R. S., 575.

This statute must be considered in connection with the one just passed from, and with any other relating to the powers of private corporations, in order to understand and arrive at the legislative intent.

It will be observed that this statute empowers such corporations to enter into any contract or obligation whatever, with only one restriction, which is that the contract or obligation *must be essential to the transaction of the corporation's authorized business.*

What was the *authorized business* of the private corporation making the conveyance in question?

That *business* was *authorized* which its charter stated it was formed to pursue.

What was that business? "Business" is defined to be "that which busies, or that which occupies the time, attention, or labor of one as his principal concern, whether for a longer or shorter time; employment; occupation." Webster. "Business" is a word of large signification, and denotes "the employment or occupation in which a person is engaged to procure a living." Goddard *vs.* Chaffee, 2 Allen, 395.

"It is the synonym of employment, signifying that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." Martin *vs.* State, 59 Ala., 36.

The corporation making the conveyance in question was a private trading corporation, the business of which consisted in buying and selling for profit in the ordinary course of mercantile business.

That was its *business* within the meaning of the statute, and when that ceased, without intent to resume, the *business* no longer existed, and no contract thereafter made *could be essential to the transaction of*—the doing of—*that business.*

The mere act of paying or securing an indebtedness can never become a *business.*

This statute is broader than that before noticed, and evidently was intended to apply only to such contracts and obligations as it might become necessary to assume or make in carrying on the business for which incorporation was given.

One applies, in terms, to power over property necessary to be

held or purchased to carry on the corporate business and to property necessary to sell, mortgage, or otherwise convey for a like purpose, while the other applies to every kind of obligation or contract necessary to be made or assumed, because essential to the transaction of its authorized business.

The statute further provides that "corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation." R. S., 577.

Was it by this statute intended to confer power on a corporation to borrow money and encumber its property to secure its payment when the corporation, because of insolvency, had ceased to do business, with intent not to resume?

The limitation on the sum to be borrowed, evidently based upon the presumed ability to pay to that extent, and the fact that the pledging of the income is authorized would seem to forbid the belief that a corporation so circumstanced was contemplated by the act, for such a corporation would have no income to pledge.

These are all the provisions of the statute affecting the powers of private corporations, and it certainly is true that they do not confer upon them in reference to corporate property that unrestricted power a natural person has over his own.

No parts of the acts of the legislature affecting private corporations carried into the Revised Statutes or subsequently enacted, except chapter 5, title XX, R. S., seem to have application to the winding up of the business of an insolvent corporation after it has ceased to do business with intent not to resume, nor do they undertake to declare the rights of creditors under such circumstances, but do seem to apply only to the creation, organization, powers, general management, and like matters looking to the right to carry on and the active transaction of the business for which incorporation is given in the particular instance, and for this reason such parts of the statute cannot be looked to in order to determine the rights of creditors or the powers that may be exercised by the corporation under such circumstances.

Such rights and powers must be determined by the general principles of law applicable to the conditions if they be not controlled by statute.

Among other things, chapter 5, title XX, R. S., provides that "upon the dissolution of any corporation already created by or under the laws of this State, unless a receiver is appointed by some court of competent authority, the president and directors or managers of the affairs of the corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect the outstanding debts, and divide the money and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution as far as such money and property will enable them; and for

this purpose they may maintain or defend any judicial proceeding." R. S., 606.

These trustees are made responsible to creditors and stockholders to the extent of property and effects that shall have come into their hands. R. S., 607.

By "dissolution" as here used is meant that result which follows the expiration of time limited by its charter or the result of a judgment of a court of competent jurisdiction declaring the dissolution. R. S., 604.

The mere insolvency of a corporation followed by cessation of business with no intent to resume will not operate what is technically known as dissolution, but it has been held in many cases, with much reason, that such condition of affairs will confer on creditors practically the same rights as would they have under technical dissolution. Slee *vs.* Bloom, 19 John., 456; Briggs *vs.* Penniman, 8 Cow., 387; Bank *vs.* Ibbotson, 24 Wend., 478; Casey *vs.* Railroad Co., 5 Iowa, 357; Moore *vs.* Whitcomb, 48 Mo., 543; Savings Association *vs.* Kellog, 52 Mo., 588.

Art. 606 (R. S.) establishes the proposition that a trusteeship exists in every case of dissolution to which it is applicable, and this necessarily fixes upon the property a trust primarily for the payment of debts, and we see no good reason, so far as creditors are concerned, why the facts shown to exist by the certificate before us should not be given the full effect technical dissolution would have.

If, however, that article is to be limited in its operation it indicates the legislative policy in such cases.

This is illustrated by other legislation. Whenever a sale is made of the road-bed, track, franchise, and chartered powers and privileges of a railroad corporation, unless a receiver be appointed, the directors or managers are made trustees for the creditors and stockholders of the sold-out company, with full power to administer the unsold estate first for the benefit of creditors, and to them are responsible to the extent of property received. R. S., 4264. When there is a trustee clothed with such power over property a trust strictly exists, which the *cestui que trust.* may enforce.

This is an instance of a trust on corporate property in behalf of creditors where there has been no dissolution of the corporation, and this is simply because the property is no longer used or intended to be used for the corporate purpose for which it was originally acquired.

While the general rule is that the insolvency of a corporation will not authorize the appointment of a receiver at the suit of a creditor so long as it is honestly carrying out the business for which it was incorporated, still such appointment may be made if the creditor's right is imperilled by a threatened misappropriation of assets, and this is upon the ground that the corporate property is a trust fund to which the creditor has the right to look for payment of the debt due him.

By a recent statute the appointment of a receiver is authorized

when a corporation is insolvent or in imminent danger of insolvency, as when it has been dissolved. S. C. S., 1461.

Without considering whether there may be implied limitations to this statutory rule, it illustrates the fact that in this State mere insolvency of a corporation -as been made a ground for the appointment of a receiver doubtless for the purpose of enforcing claims against the corporate property in behalf of creditors which could not be thus enforced without recognition of the fact that the property is, at least in a limited sense, a trust fund to which creditors have the right to resort.

A limited partnership, under the statutes of this State in a respect material to the questions before us in this case, is very similar to a corporation.

The special partner is liable for debts of the partnership only to the extent of the fund contributed by him to the partnership, as is the stockholder in a corporation liable only to the extent of his stock subscription, but the legislature of this State, recognizing that all creditors of such a partnership have equal claim upon the assets of such a firm when insolvent or in contemplation of insolvency, has declared that "every sale, assignment, or transfer of any property or effects of the partnership when insolvent or in contemplation of insolvency or after or in contemplation of insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership, and every judgment conferred, lien created, or security given by any such partnership under the like circumstances and with like intent shall be void as against the creditors of such partnership." S. C. S., 3460.

This statute simply gives legislative sanction to the proposition, often asserted and sometimes denied in cases of insolvent corporations, that when there is no personal liability for a debt and the creditor must look to a fund such as the capital of a corporation that such fund is a trust fund if the corporation is insolvent and has ceased business, to which the creditor may resort on terms of equality with other creditors who acquire no lien prior to the time the trust character attached.

This statute makes a broad application of that rule, even when there is a personal liability on the part of the general partners, on the ground that as to the special partner there is no personal liability.

The succeeding article denies the right even of the general or special partner under such circumstances to make any sale, assignment, or other transfer of or to create any lien on property of the general or special partner with intent to give a creditor of himself or of the partnership a preference over the other partnership creditors. S. C. S., 3461.

Under the statutes in force in this State, if an insolvent corporation, in contemplation of an assignment under the statute with intent to give preference to one creditor, should convey to him the property of the corporation, this would be invalid as to other creditors and the property would pass to the assignee under a subsequent assignment

for the benefit of all creditors unless the person so taking took under circumstances that would constitute him a *bona fide* purchaser, which could not well be if the corporation was insolvent and was known to have ceased business on that account, for such knowledge of itself would seem sufficient to put the purchaser on inquiry. S. C. S., 611.

This statute further illustrates the fact that the property of an insolvent corporation is deemed in this State a trust fund, and emphasizes the right of all of its creditors to equality in distribution of its assets as against all other creditors who had not acquired superior right prior to known insolvency.

In the application of principles illustrated by this statute ought the fact that the insolvent corporation subsequently made no general assignment and made in effect only mortgages conveying all of its property, as from the papers certified by the court of civil appeals appears to have been the case, to affect the rights of the parties?

The mortgages, if sustained, would give preferences as fully as would absolute conveyances, and all of the corporate property, if not more than sufficient to pay the preferred claims, would pass from the corporation as fully as would it by subsequent assignment.

These statutes have been referred to not because any of them, in terms, declare the law applicable to the question propounded, but because they indicate the trend of legislation on some essential matters involved in the questions and tend to support the proposition, through analogies, that the assets of an insolvent corporation which has ceased to carry on business and does not intend to resume is a fund from which all creditors not secured by valid liens existing before the condition was fixed have the right to be paid on terms of perfect equality.

If such a fund be a trust fund, then the assets of a corporation so circumstanced are trust funds, and those whose right and duty it is to administer such a fund are trustees.

We have seen that such a corporation as the hardware company in England and in this State have not the same powers in reference to property owned by them for corporate purposes as have natural persons, and that in this State there is no statute, expressly or by necessary implication, conferring on such corporations power to make preferential mortgages or like conveyances when in condition assumed in the questions propounded, and the question arises whether under the general principles of law or equity applicable to such a condition such a power exists.

No English decision has been furnished in which the questions involved arose or were discussed, and it is probably true that the laws of that country in regard to insolvent corporations and persons have been such for three centuries past that no claim would be made in the courts of that country that such conveyances as the questions submitted refer to were valid against other creditors.

We take it for granted that all English courts under the laws of that country would hold all such attempted preferences unauthorized and illegal when made by an insolvent corporation circum-

stanced as was the hardware company, and therefore seek no further for authority from that source.

It would be a useless consumption of time to review the many American decisions bearing on the questions submitted, for it must be conceded that they are clearly in conflict, and that on each side of the question may be found many decisions made by courts eminent for learning and conservatism; but reference will be made to a sufficient number on each side of the question to show the grounds on which these conflicting decisions rest.

Catlin *vs.* Eagle Bank (6 Conn., 233) is a leading case, and is understood to rest on substantially the same facts presented in first question certified, except that it does not appear that there was no intention to resume the corporate business.

While conceding that such corporations derive their powers solely from their charters, it was assumed that an insolvent corporation which had ceased to do business had the same power in the management and disposition of its property as had natural persons, and that for this reason the officers of such corporation might prefer creditors.

It was further held that under such circumstances no trust relation existed between the managing officers of the corporation and creditors, and that no trust attached to the property of the insolvent corporation in behalf of creditors.

In Dana *vs.* Bank (5 M. & S., 223) preference was given to named creditors through conveyance of property in trust to be sold for their benefit when the corporation was insolvent, but it does not appear that this was done after the corporation had ceased to do business, or that this made cessation of business necessary, nor that this was contemplated.

The court held that under the principles of the common law such corporations had certain powers enumerated and power to do all other acts that a natural person had unless restrained by its charter or some other act.

In the course of the opinion it was said: "Although there are some restrictions placed on the bank by the act establishing it, yet it cannot be pretended, or, at most, cannot be shown, that the bank or its president and directors are either expressly or impliedly restrained from giving directly or indirectly preference to some of its creditors over others; and, not being restrained in this respect by this or any other act, it must be deemed to have the same power to make a distinction between its creditors and to give preferences to some of them over others that any natural person has."

In Wilkerson *vs.* Banerle (41 N. J. Eq., 636) it appeared that the directors of a corporation transferred all of its assets to one of its directors after it became insolvent. The sale was made to give preference, and this by other creditors was claimed to be illegal as to them, but the court said: "The correctness of this view and the success of the contention now made depend upon the legislation now in force respecting this subject, for if there be no legislative prohibition against the transfer of corporate property or its use in preferring creditors after insolvency, no reason can be given why

such transaction should be invalidated which would not also invalidate the like transactions of individuals."

It was held in that case, however, as the purchaser was a director who took part in the transaction, that it was incumbent on him to show that he paid fair value for the property, or otherwise he should be held responsible for the difference between that and the price paid.

In Pyles *vs.* Furniture Company (30 W. V., 123) it was held that an insolvent corporation having ceased to do business has the same power as an insolvent individual to prefer a creditor in a general assignment of all its property for the payment of its debts, but it seems this decision was controlled by a statute, but for which the court would have held otherwise, as is shown in the opinion as well as by the cases of Lamb *vs.* Laughlin, 25 W. V., 300, and Lamb *vs.* Cecil, 28 W. V., 653.

In Warfield, Howell & Co. *vs.* The Marshall County Canning Co. (72 Iowa, 670) it is said, speaking in a case in which the effect of a mortgage to directors was to defeat the claims of other creditors: "The mortgagees, it is true, were officers and stockholders of the corporation; but notwithstanding that fact, they had the right to procure the corporation to execute the mortgage, although other creditors of the corporation are unable to obtain the payment of their indebtedness. Corporations can make contracts and transfer property, possessing the same powers in such respects as private individuals (Code, s. 1059). Such is the rule in the absence of a statute, and therefore it has the right to prefer one creditor to another (2 Mor. Priv. Corp., sec. 802). The fact that the preference is exercised in favor of directors or shareholders of the corporation is immaterial, although the director or shareholder may have voted for the proposition and the security given was to secure an indebtedness to himself." The facts of that case, it is proper to say, may not have been practically the same as those made the basis of the questions propounded, but it tends to show the grounds of decision, holding that at all times prior to technical dissolution corporations have power, when insolvent, to give preferences even to directors.

Many other cases might be referred to bearing on both states of fact presented in the questions propounded, but those already noticed give substantially the grounds on which rest all the opinions holding such transaction legal.

Rouse, trustee, *vs.* National Bank (146 Ohio St., 493) involved the facts presented in the first question propounded, and in that case the doctrine that corporations have the same power over corporate property as have natural persons was denied.

Approving the principles announced in Wood *vs.* Dummer (3 Mason, 311), Sanger *vs.* Upton (91 U. S., 52), and Curran *vs.* State of Arkansas, 15 How., 312, and quoting with approval from the opinion, it was held "that where a corporation for profit * * * becomes insolvent and ceases to carry on its business or further pursue the purposes of its creation the corporate property constitutes a trust fund for the equal benefit of the corporate creditors in proportion to

the amounts of their respective claims, and that it cannot then by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf over the other creditors or over an assignment thereafter made for the benefit of creditors."

The case of Marr *vs.* The Bank, 4 Cold., 471, involved substantially the same facts, and therein the same rules were announced, with citation of many cases.

The case of Appleton *vs.* Turnbull (84 Maine, 72) rested on facts which made it necessary to determine the character of the assets of an insolvent corporation and the rights of its creditors, and in the opinion it was said: "It is too firmly established at the present day to be questioned that the capital stock of a corporation is a trust fund for the payment of its debts. It is a substitute for the personal liability of the individual members of private partnerships, and those who deal with the corporation have a right to rely upon its capital stock for their security. Unpaid stock is as much a part of the assets of the corporation as the money that has been paid in upon it. * * * During the existence of the life of the corporation it is a trust to be managed for the benefit of the stockholders, but in the event of its dissolution or insolvency it becomes a trust fund for the benefit of its creditors. If in such case the assets are not sufficient to pay all its debts in full, each creditor is equitably entitled to receive a ratable share of the assets which remain. * * * In such cases the doctrine laid down by the courts for thirty years is that they must pay up their shares in full, and are entitled only to a ratable distribution of all the company's assets and are to receive dividends upon their claims against the corporation in common with other creditors. Morawitz on Priv. Corp., sec. 861; Cook on Stock & Stockholders, sec. 193. The rule was settled by the Supreme Court of the United States in Sawyer *vs.* Hoag, 17 Wall., 610, where the court say: 'The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent and this fact became known to the appellant the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally, in equity, to all the creditors and could not be appropriated by the debtor to the exclusive payment of his own claim.' Scovill *vs.* Thayer, 105 U. S., 143, 152; Sanger *vs.* Upton, 91 U. S., 56; Stockton *vs.* Mechanics' Bank, 32 N. J. Eq., 163, 167; Williams *vs.* Traphagen, 39 N. J. Eq., 57; Wheeler *vs.* Miller, 90 N. Y., 353. The same rule prevails in England, as may be seen in the leading decision of Griswell's case, L. R. 1, ch. 528. If the defendant's rights as well as his duties were to be determined by the common law alone it is evident that the defense interposed in this case could not prevail."

In Woolen Mills Co. *vs.* Kampe (38 Mo. App., 229) the general questions involved in this case were considered, and after stating the general powers of a corporation while carrying on its business and the right to protection persons obtaining preferences in good faith would be entitled to the court said: "But these principles are only

applicable to what may be termed or designated as 'going concerns.' They cannot be applied to insolvent corporations. By this we do not wish to be understood as deciding that a corporation that is financially *embarrassed* will be deprived of the right to deal with its corporate property in a legitimate and proper way, but we do say that when the corporation is hopelessly insolvent, and there is no reasonable or well-founded hope for a continuation of its business, and these facts are known to its officers and directors, then all of the assets of the corporation became a trust fund in the hands of the directors, to be administered by them as trustees or agents for the equal benefit of all the creditors of the concern, and any attempted preference in favor of the directors themselves or of a stranger will not be upheld." Williams *vs.* Jones, 23 Mo. App., 132; Roan *vs.* Winn, 93 Mo., 503; Foster *vs.* Mullanphy Planing Mill Co., 92 Mo., 79.

The same reasons for denying an insolvent corporation so circumstanced power to give preferences are announced with much clearness and force in the following cases: Olney *vs.* Conanicut Land Co., 16 R. I., 597; Haywood *vs.* Lumber Co., 64 Wis., 639; Beach *vs.* Miller, 130 Ill., 162; Corry *vs.* Wadsworth, 38 Am. & Eng. Corp. Cases, 164; Turnbull *vs.* Lumber Co., 55 Mich., 387; Adams *vs.* Milling Co., 35 Fed. Rep., 433; Howe, Brown & Co. *vs.* Sanford, Ford & Teel Co., 44 Fed. Rep., 231; Consolidated Tank Line Co. *vs.* Varnish Co., 45 Fed. Rep., 7.

The line of decisions first referred to in substance holds that insolvent corporations, even though they have ceased to do business, have the same power to give preferences as have natural persons, on the theory that unless their charters forbid this it is an implied power, but this seems indefensible under the rules applicable to the construction of charters such as may be granted to private corporations under the general laws in force in this State.

The power is not expressly given and it cannot be implied, for it is not necessary to the accomplishment of any purpose for which such corporation may be created.

While such a corporation is carrying on its business it has power to buy on credit such property as to secure such services or funds as may be reasonably necessary for the transaction of its legitimate business, and to secure indebtedness thus incurred may give mortgages or other security, and thus give preferences although in fact insolvent.

The exercise of such a power may often be not only beneficial but necessary for the continuance or prosperity of the business, but no such necessity can exist where the business has been abandoned. Self-interest, while the business is honestly carried on, will ordinarily be sufficient to prevent abuse of what is then a right, but where the business has ceased on account of insolvency stockholders have no further beneficial interest in the corporate assets, and they can have no right or power directly or through the managing officers, through preferences, in effect, to pay or secure some of the creditors at the expense of others if the law be that the assets of an insolvent corporation that has ceased business with no intent ever to resume

is a fund held in trust for creditors, for in such a fund all creditors have equality of right unless prior to the condition which gives that one or more have acquired right to priority.

The second class of cases to which reference has been made seem conclusively to establish the proposition that the assets of a private corporation circumstanced as was the hardware company at the time its directors attempted to give preferences are a trust fund held for the benefit of creditors—a fund which they have the right to have converted into money and that distributed among them ratably.

The reasons for holding the assets of such an insolvent corporation to be a trust fund for the payment of its debts are set forth so clearly and fully that we will not undertake to restate them or to give additional reasons, but will simply refer to some of the opinions, giving the grounds, among which are the following: Wood *vs.* Dumner, 3 Mason, 308; Curran *vs.* The State, 15 Howard, 315; Sanger *vs.* Upton, 91 U. S., 60; Marr *vs.* The Bank, 4 Cold., 476; Sawyer *vs.* Hoag, 17 Wall., 610; County *vs.* Allen, 103 U. S., 508.

The subject is elaborated by elementary writers. Taylor on Priv. Corp., 654–659; Morawetz on Priv. Corp., 780–803; Wait on Ins. Corp., 142–157; Waterman on Law of Corporations, 120–140; Cook on Stock & Stockholders, 199; Angel on Corp., 600–604.

Whatever technical objections may be urged in the use of the words "trust" and "trustee" in such a connection is a matter of no importance, for the substance of the matter is that the word "trust" is used to express the fact that creditors of an insolvent corporation have the right to have the specific property owned by the corporation subjected to the payment of the sums due them; and the word "trustees" is used to give expression to the fact that the directors and other managing officers of such a corporation lawfully having possession and control of such assets are under obligation so to apply them.

If more appropriate terms be suggested, courts no doubt will be willing to adopt them.

All of the decisions of the Supreme Court of the United States are understood to hold that those terms properly describe the relation between creditors of an insolvent corporation and its assets and officers lawfully controlling them and to give the usual effect to such relations, but it is suggested that the opinion in Smith Purifier Company *vs.* Groarty (136 U. S., 241) casts a doubt upon this subject or suggests limitations that would affect the questions involved in this case.

The opinion is not so understood, and it may be true that the real difficulty some courts may have had was not so much any doubt upon the question whether the assets of an insolvent corporation were a trust fund which creditors had right to have subjected to payment of sums due them as was it on account of a doubt as to the time when and circumstances under which such right so attached as to cut off all power of directors or even of stockholders to confer upon any person as a creditor by way of preference a right inconsistent with the right of all creditors to a ratable distribution

of the proceeds of such assets as against all other creditors not holding legal priorities.

The cases cited in the opinion referred to will be noticed with a view to illustrate the fact that no limitation of the general rule was intended, as well as to show when that court has understood the rule to become operative as to creditors.

In case of Graham *vs.* Railroad Co. (102 U. S., 148) it appeared that a solvent corporation with no fraudulent intent disposed of lands for an inadequate consideration, and a subsequent creditor sought to apply the rule in his favor, but the court held that he could not question the transaction.

The court, however, said: "When a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which in other circumstances are as much the absolute property of the corporation as any man's property is his."

In Richmond's Executor *vs.* Green (133 U. S., 30) it appeared that Richardson loaned a sum of money to a railroad company and as a bonus therefor received shares of paid-up stock and bonds and was given practical control of the board of directors, and he afterwards received other bonds as further collateral, when he proposed to make further advances if three hundred other bonds were put in his hands as collaterals. This was done, but he advanced no more money, and after the insolvency of the company he claimed to hold bonds last mentioned and those given as further collaterals to secure the sum lent. When these things occurred he was acting as treasurer of the company. It was held that as between him and other creditors of the company he could not under the circumstances hold them as collateral for his debt. The bonus was also held to be illegal.

The court quoted with approval so much of the opinion in Graham *vs.* Railroad Co. as has been inserted, and from the opinion in case of Railway Co. *vs.* Ham (114 U. S., 587) as follows: "The property of the corporstion is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved and all its business wound up or when it is insolvent all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among its stockholders. It is also true in the case of a corporation as in that of a natural person, that any conveyance of property of the debtor, without authority of law and in fraud of existing creditors, is void as against them;" and the court then said that "the principle underlying all of the decisions which we have cited upon this point is that the capital stock of a corporation when it becomes insolvent is in law assets of the corporation, to be appropriated to the payment of its debts, and that creditors have the right to assume that the stock issued by a corporation and held by its stockholders as paid-up stock has been paid up, or, if unpaid, that a court of equity, at the instance of the proper parties, could require it to be paid up."

In Fogg *vs.* Blair (133 U. S., 534), also cited, it appeared that a railroad company in purchasing the road and property of another company agreed to pay a claim held by a person against the latter company, but in no way secured by lien on its property, and after the holder of that claim sought to give it priority over a mortgage made by the purchasing company to secure an issue of bonds; but the court held that this could not be done, and in the course of the opinion said: "We do not question the general doctrine invoked by the appellant, that the property of a railroad is a trust fund for the payment of its debts, but we do not perceive any place for its application here; that doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers except subject to the liability of being appropriated to pay that indebtedness."

The case of Peters *vs.* Bain (133 U. S., 670), while it asserts the general rule as to the trust character of the assets of a corporation and the relation of directors to that and to creditors, seems to have no application to any question involved in questions submitted.

In so far as the rights of creditors of an insolvent corporation are concerned, there exists no good reason for making any distinction between unpaid subscriptions for stock and other corporate assets, for each belong- to the fund from which creditors are entitled to be paid.

As we have before seen, in so far as the rights of creditors are concerned, the consequences of technical dissolution occur when corporation is in condition to set forth in questions propounded, and in addition to the authorities cited on that point the following are now added: Graham *vs.* Railway Co., 102 U. S., 161; Railway Co. *vs.* Ham, 114 U. S., 587; Cares *vs.* Wadsworth, 38 Am. & Eng. Corp. Cases, 171.

In case last cited, after announcing the general principles governing the assets of an insolvent corporation, the court answered a question involved in cases of that character as follows: "At what stage of a corporation's affairs must it be pronounced insolvent, so as to bring it within the principles we have declared? It is not enough that its assets are insufficient to meet all its liabilities if it be still prosecuting its line of business, with the prospect and expectation of continuing to do so; in other words, if it be in good faith what is sometimes called a 'going' business or establishment. Many successful corporate enterprises, it is believed, have passed through crises where their property and effects, if brought to present sale, would not have discharged all their liabilities in full. We feel safe in declaring that when a corporation's assets are insufficient for the payment of its debts and it has ceased to do business or has taken or is in the act of taking a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or its emparrassments are such that early

suspension and failure must ensue, then such corporation must be pronounced insolvent."

The case made by the questions propounded brings it clearly within so much of the rule thus stated as may be safely adopted, and it is not now necessary to inquire whether other parts should be qualified.

The condition of the corporation set forth in the questions propounded, under the long-recognized rules of equity, conferred upon every unsecured creditor of the corporation the right to a ratable share of the proceeds of all the assets of the corporation not subject to priorities lawfully existing when this condition arose, and we therefore answer that neither the stockholders nor directors of the insolvent corporation had lawful power under the facts stated to make a preferential deed of trust whereby any creditor, whether a stockholder, director, or other officer of the corporation or not, could acquire a preference, and that the attempted preference would be invalid as to other creditors of the corporation.

STAYTON,
Chief Justice.

Opinion delivered Nov. 16, 1893.

* * * * * * *

(Record, page 228.)

Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District.

LYONS-THOMAS HARDWARE CO. *et al.*, Appellants,
vs.
PERRY STOVE MANUFACTURING CO. *et al.*, Appellees.
} No. 184. Appeal from Lamar County.

This suit was originally brought November 20, 1889, by appellees, Perry Stove Manufacturing Company and six other simple contract creditors of the Lyons-Thomas Hardware Company, in what they termed a "creditor's bill," setting up that the said hardware company was an insolvent private corporation, and had, on November 9, 1889, executed to L. P. Harrison, trustee, three mortgages to secure certain debts, covering all of its property, and giving preferences; that the Baker Wire Co. had sequestered a part of the assets, making the hardware company, the trustee, and the Baker Wire Co. parties, and praying for an injunction, that a receiver be appointed, that the mortgages be set aside and the fund distributed as a trust fund among the creditors without preferences.

A temporary injunction was granted by the district judge at chambers November 20, 1889, and notices ordered to be issued for all of said parties to appear before him on November 29, 1889, to answer said petition and show cause, if any they have, why a receiver should not be appointed as prayed for.

Upon the hearing November 29, 1889, all the defendants answered under oath, and the creditors secured under the first mortgage made themselves parties and, with the trustee, set up the mortgages and prayed that he be allowed to administer the trusts and to execute the same under the direction of the court, and the case was fully heard before the court upon questions growing out of the application for injunction and receiver, and the court rendered its judgment dissolving the injunction, declaring the mortgages to be valid and the security good, refusing the plaintiffs' application for a receiver, and granting the application of the defendants and intervenors that the trustee, L. P. Harrison, be allowed to administer the trusts under the order and direction of the court, ordering that he execute a bond in the sum of $85,000, conditioned that he would faithfully execute the trusts and pay over to the secured creditors the money, as in the mortgages directed, appointing appraisers to inventory and appraise all of the said property, and directing that the trustee make his report at the next regular term of the district court, and directing the clerk to enroll the decree upon the minutes of the court, which order was duly excepted to at the time. This decree was duly signed by the judge and enrolled by the clerk, and at the following term the minutes of the court were signed by the judge. The trustee gave bond for $85,000, as required. The inventory was duly filed and approved, and the trustee administered the trusts under the directions and orders of the court made in vacation, sold the property, and paid the proceeds upon the mortgaged debts as ordered, and at the following term filed his accounts showing how he had executed the same, and asked to be discharged.

The plaintiffs took no further action in the case and made no effort to have the decree of the court set aside, but acquiesced therein until all of the property had been sold and the proceeds applied to the payment of the secured debts under the order of the court, when, on August 7, 1890, the plaintiffs and a number of other creditors filed a "first amended original petition," setting up that Schoverling, Daily & Gales and eighteen other creditors of the Lyons-Thomas Hardware Co. had obtained judgment against it; that the mortgages were invalid and the trustee had refused to pay any except the secured debts; that the members of the hardware company owed large amounts of unpaid stock; that the court had rendered its decree and directed that the trust be executed by the trustee, L. P. Harrison, under the direction of the court, and that he give bond for $85,000, which he did give; that he had wasted the funds, and praying judgment against him on the bond; that the funds be divided, etc.

On March 30, 1891, the plaintiffs filed a second amended original petition, in which they seek judgment setting aside the mortgages and against the trustee for conversion, waste, and devastavit, and also against the stockholders of the corporation for unpaid stock, and asks judgment against the two banks and L. P. Harrison. The answers and pleas of intervention set up the mortgages and their validity and the execution thereof by the trustee under the orders of the court.

The case was tried before the court, and on April 9, 1891, the court overruled the demurrers and exceptions of the defendants and intervenors to plaintiffs' petition and sustained the plaintiffs' demurrer and exceptions to the answers of defendants and pleas of intervention by intervenors, to which they excepted, and rendered judgment in favor of the plaintiffs against the proceeds of the sale of the property, less his costs, expenses, and commission for selling; also a judgment in favor of plaintiffs against the Farmers' and Merchants' bank for $48,193.70, the amount of said money paid to it by said trustee on its debt; also a judgment against the Paris Exchange bank for $7,508.10, the amount of said money paid to it by said trustee on its debt; decreeing that the mortgages were void; that the fund be paid into court; dismissing the Baker Wire Co. from the case, etc. Defendants and intervenors in open court excepted and gave notice of appeal, filed their statement of facts, appeal bonds, and assignments of error, and bring the case up by appeal.

I.

The first and fourteenth assignments of error are treated together by appellants. Under these assignments two propositions are made, as follows: 1st. A private business corporation, when not restrained by statute, has the same power to execute a mortgage as an individual, and, if insolvent, may in good faith execute a valid mortgage with preferences. 2nd. A private corporation in this State is authorized by statute to execute a mortgage, and, there being no exception in the statute, the courts cannot legally engraft one; but corporations have the same rights as individuals to execute mortgages preferring creditors.

When this case was pending in the court of civil appeals of the second supreme judicial district that court certified to the supreme court for answer the following question: "Whether or not a preferential deed of trust executed by a private trading corporation (chartered in July, 1884, under general laws) after it has become insolvent and consequently ceased to carry on its business, without any intention of resuming the enterprise, is void as against the unsecured creditors of such corporation?"

This question was based upon the findings of the court below, which are fully sustained by the evidence adduced on the trial. The supreme court in an elaborate and exhaustive opinion rendered by Mr. Stayton, chief justice, in answer to said question, after discussing the powers of a corporation under the different provisions of our statutes, and after reviewing at length the numerous decisions on the subject, both of England and America, closes its opinion as follows: "The condition of the corporation set forth in the question propounded under the long-recognized rules of equity conferred upon every unsecured creditor of the corporation a right to a ratable share of the proceeds of all the assets of the corporation not subject to priorities lawfully existing when this condition arose, and we therefore answer that neither the stockholders nor directors of the insolvent corporation had lawful power under the facts stated

to make a preferential deed of trust whereby any creditor, whether a stockholder, director, or other officer of the corporation or not, could acquire a preference, and that the attempted preference would be invalid as to other creditors of the corporation." This settles the propositions raised by said assignments against the appellants, and we must hold that said assignments are not well taken. This ruling applies to the fifth assignment of error, which raises practically the same issue.

II.

The second assignment of error raises the proposition that plaintiffs below were not entitled to maintain this action, because it was not alleged that they had valid liens, nor had their claims been reduced to judgment, and had failed to collect the same under execution.

We will not here discuss what the status of claims of creditors must be before they can ordinarily bring a suit in the nature of a "creditor's bill," as it is not necessary under the attitude of this case. This action was brought to have the trust deed declared void and to subject the property of an insolvent corporation to the payment of the claims of all the creditors of the concern. The corporation being insolvent, the property it owned was held in trust by the directors for the benefit of all creditors who under the law had an equitable lien upon the property of the corporation, and when the directors attempted to appropriate that property to the payment of some creditors to the exclusion of others, those others had the right to bring an action for their relief in the manner here done. The allegations of the petition show all the plaintiffs to be *creditors* of appellant company, and it was unnecessary to allege that their claims had been reduced to judgment, or that they were secured by specific liens, as their rights were not affected by the status of their claims.

III.

Appellants complain of the court for overruling their special demurrer, which embodied the following proposition: "Where numerous creditors join in a bill seeking to litigate in one suit equitable rights to assets; to recover against alleged members of a corporation the value of unpaid stock; for capital stock wrongfully transferred or misapplied; damages against the trustee for alleged waste, devastation, and misapplication of property or money which came into his hands as trustee, such suit is a misjoinder of causes of action and cannot be maintained."

This was an equitable action brought by the creditors of appellant hardware company seeking to reach the property of said company in the hands of one to whom it had been transferred by its officers, and to have such transfer declared void and of no force as against all the creditors of said company. In the bill there was an allegation that the members of said company were due something on unpaid stock, and especially alleged that defendant Harrison was so indebted, and judgment was asked against him for same. The amount due by any of them was not alleged. The case was

tried by the court without a jury, and the issue raised by such allegations seems to have been ignored by the counsel and the court. The record does not show that any evidence was introduced on this issue, nor is there any finding of the court thereon. As we gather it from the record, the only issues that were tried by the court were the validity of the deeds of trust made by the officers of said company and the liability of Harrison for the funds paid the preferred creditors and their liability for the amount received by them. This being the only phase of the case considered by the court, no harm was done appellants by the ruling of the court if erroneous, which we deem unnecessary to determine.

IV.

The fourth assignment of error complains of the court for overruling special exception No. 3, which exception is as follows: "Because it appears from plaintiffs' said amended petition that the Laughlin Nail Co., Curtis Bros. & Co., Sargeant & Co., and W. M. Rogers Manufacturing Co. are the only parties for whose benefit one of the alleged deeds of trust was executed, who are relying on their security, and they are not before the court nor made parties to this suit."

The petition of plaintiffs shows that the parties named were creditors and were named as beneficiaries in the instruments attacked by the bill, but were not made parties, but the trustee was. Appellants contend that where parties seek to set aside a deed of trust and have it declared void, the beneficiaries therein are necessary parties to the suit. We think the converse of this proposition is true. The rule laid down in Pomeroy on Remedies is as follows: "There is a broad distinction between the case of an action brought in opposition to the trust to set aside the deed or other instrument by which it was created and to procure it to be declared a nullity and that of an action brought in furtherance of the trust to enforce its provisions, to establish it as valid, and to procure it to be wound up and settled. In the first case the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all and defend for them. In the second all the beneficiaries must be joined, if not as plaintiffs then as defendants, so that the whole matter may be adjusted in one proceeding and a multiplicity of suits avoided. The reason of this distinction is obvious. It is that any one person interested in opposition to the trust has the right to test the validity thereof, and his voluntary action cannot be controlled by the will of others while the trustees themselves are sufficient to represent and defend all the interest of those who claim under the trust; but when the trust is assented to and the purpose is simply to carry out its provisions all the beneficiaries are alike interested in that object and in reaching that same result, and it is just to the trustee that the controversy should be ended in one proceeding."

The doctrine here enunciated is supported by R'y *vs.* Butler, 56 Texas, 511, and by Kerrison *vs.* Stewart, 93 U. S., 155.

No case to which we have been referred contravenes the rule here

laid down. Appellants in support of their contention cite Ebell *vs.* Bursinger, 70 Texas, 120, and Hudson *vs.* Milling Co., 79 Texas, 401. In the first case the court says "that the general rule is well established that in suits by or against the trustee for the recovery of the trust property the beneficiary is a necessary party." We recognize this as a correct principle, but the court further says that to this rule there are well-recognized exceptions, one of which it says is the "case of an assignee in a deed of assignment made by an insolvent for the benefit of his creditors." The trustee, Harrison, in this case was vested by the terms of the instrument with full power to execute the trust imposed in him, and it was his duty, and he had the power to do so, to defend the trust against all assailants. Every defense that could be made by the beneficiaries could be made by him, and, having accepted the trust, he was interested in carrying out its provisions, and in this case he evidently endeavored to uphold the conveyance.

The other case is not analogous to this. It is true that in rendering the opinion in that case Mr. Stayton, chief justice, laid down the general rule that all beneficiaries adversely interested to the plaintiffs are necessary parties, but said if there were exceptions to the general rule it was not necessary to consider them in that case. In that case there was no effort to set aside the conveyance as a nullity, but it was sought to defeat the clause preferring creditors and to have the conveyance declared a general assignment and the property administered thereunder. In that case it was held necessary for beneficiaries to be made parties, but in the case of Preston *vs.* Carter, 80 Texas, 388, a contrary rule is enunciated. Which of these two cases is correct we will not undertake to determine, as the principle upon which they were decided does not necessarily apply to the case at bar. Where an effort is made to entirely set aside a conveyance of this kind and render it of no force whatever, in our opinion, the beneficiaries are not necessary parties. Where an action is brought to have a conveyance adjudged to be a general assignment there seems to be some force in the proposition that beneficiaries should be made parties. In such a case the trustee is not interested, whether creditors are preferred or not, but he is interested that the conveyance be administered with him as trustee. As to the rights of creditors between themselves he has no concern. It would seem to be inconsistent with his duty to espouse the claim of one creditor as against that of another. When, however, the instrument is attacked as an ullity, then he is concerned and should do all in his power legally to maintain and uphold the conveyance and can represent the beneficiaries in the litigation.

V.

Complaint is made to the action of the court in permitting plaintiffs to show that the hardware company was indebted to them and the nature of such indebtedness. As before stated in this opinion, the plaintiffs had alleged they were creditors of said hardware company, and, being such, they had the right to sue, and the

introduction of the judgments to show that they were creditors was permissible under their pleadings. It was not necessary to allege the nature and character of their claims in order to permit proof of such indebtedness.

VI.

The action of the court in permitting Harrison, trustee, to testify over objections that he paid the proceeds of the property to the two banks is challenged by appellants on the ground that the allegations of plaintiffs' petition did not warrant it. The second amended petition alleged the insolvency of the hardware company; that it had transferred its property to Harrison in trust for the preferred creditors named; that Harrison had misapplied the proceeds of the property, and if any had been paid to said preferred creditors of which plaintiffs were not advised said creditors received same with full knowledge of this litigation, and if it was paid "it was paid to a person or persons then defendant, defendants, intervenor or intervenors in this bill," and the prayer was that said banks "be required to bring into court all money, if any, paid to them or either of them by the said Harrison." We think, considering the nature of this suit, that the allegations of the petition were sufficient and there was no error in admitting the testimony. Besides, Harrison had made a report showing the disposition he had made of the property and the amount he had paid to these parties.

VII.

The 14th general assignment of error and the 7th assignment of error by Harrison, trustee, are in effect the same and will be considered together. The 14th is as follows:

"The court erred in rendering judgment against L. P. Harrison for $57,529.44, or for any amount at all, because the evidence shows that said Harrison was a trustee, and the pleadings of the plaintiffs claimed judgment against him for waste and devastavit, and the court allowed and approved his accounts and found there was no devastavit, and the record shows that the money which came into his hands was paid out by him under the orders, judgment, and decree of the court."

The following proposition is advanced by appellants thereunder: "Where a court of equity obtains jurisdiction of the parties and of the subject-matter and renders its decree appointing a trustee in the nature of a receiver and places him under bond and orders such trustee to sell property in the custody of the court and to apply the proceeds to the payment of certain debts and claims, such decree is a full protection to the trustee, and a judgment against him for the money so paid under the orders of the court is erroneous.

This assignment and proposition raises the question whether or not the order made by the district judge, in vacation, in reference to the property transferred to Harrison by the hardware company was void. If that order is void, then the trustee is not protected thereby and cannot shield himself from liability to the creditors of the hardware company. As the district court is the creature of the

constitution of the State and the statutes passed thereunder, we must look to those to determine the authority of said court. When in session it has general equity powers when not limited by statute, but in vacation the judge thereof has no power to do or perform any judicial act except such as is definitely and specifically enumerated by statute. Mr. Black in his work on Judgments, vol. 1, sec. 179, in treating of judgments rendered in vacation, says: "But in general all judicial functions are suspended during that interval. Hence, unless under statutory authority, a judgment cannot be pronounced in vacation. The rendition of judgment in a court of record is essentially a judicial act, and if performed when the court is not in session—that is, out of term—it is open to a fatal jurisdictional objection; the judgment is absolutely void; creates or effects no rights, and will even be disregarded on appeal." The same principle is enunciated by Mr. Freeman in his work on Judgments, sec. 121.

Under our statutes district judges have power in vacation to grant writs of injunction and appoint receivers, but no power is given them to take charge of property and administer it, except as may be incident to the power conferred in the appointment of a receiver. In this case the judge refused the application for the appointment of a receiver and for a writ of injunction, but at the instance of the defendants and intervenors adjudged the conveyance to be valid; appointed Harrison trustee, a relation he already sustained to the property; required him to return an inventory and execute a bond for the faithful performance of his duties, and ordered the property sold in accordance with the notice theretofore given by Harrison, as required in the conveyances, and directed him to pay the proceeds to the creditors preferred, less expenses. Plaintiffs duly excepted to this proceeding and had their bill properly signed by the judge and filed. Subsequently the judge ordered taxes to be paid on application of the trustee. Under these orders the said Harrison sold the property; paid the preferred creditors, taxes, and expenses. These proceedings were entered on the minutes of said court. All these proceedings were had in vacation. No other orders were made nor is there any evidence to show that any order was made or any recognition of said proceedings had during term time. These proceedings, in our opinion, are absolutely void. Having refused to appoint a receiver or grant the writ of injunction, the judge was without jurisdiction of the property or the trustee. The entering of the order on the minutes of the district court did not breathe vitality into the void proceedings. If, during term time, the court had have taken jurisdiction of the matter and made orders pertaining to the disposition of the property or the actions of the trustee a state of case might have arisen in which the trustee could shield himself from liability; but, no such action having been taken, the trustee is not protected by the orders of the judge made in vacation, nor are the plaintiffs bound by not raising any further objection thereto, as they could do nothing until the case was reached for trial. The orders of the court were consummated by the trustee before plaintiffs had an opportunity to be heard in term time. They had filed their suit seeking relief, of which Harrison and the

other defendants and intervenors had knowledge. Harrison knowing this and the orders being void, he should not have acted thereunder, but should have sought relief by appealing therefrom.

The appellants contend and cite many authorities to the effect that a judgment can be considered void in no case except where it appears from the judgment itself that the court had no jurisdiction. It may be voidable, but not void, if rendered by a court of competent jurisdiction, and until it is set aside and vacated it forms a good justification for the proceedings had to enforce it. No principle of law is better settled than this, but the judgment relied on in this case was not rendered by a court of competent jurisdiction. Had it been rendered in term time, no question could have arisen as to its validity, but such is not the case. The judge, in vacation, rendered the judgment in which the validity of the conveyances made by the hardware company to Harrison, as trustee, was recognized and all the rights of the parties were adjudicated. Such proceedings, so far as we are advised, have never been sanctioned by any jurisdiction. We are aware that trustees, when in doubt about their duties under the deed, have the right to decline to act without the sanction of the court. "The trustee will be protected by the decree of any court having jurisdiction and exercising the jurisdiction regularly upon proper notice given." Perry on Trusts, sec. 928. But this principle does not apply to this case, as the judge who rendered the decree had no power to act in vacation, consequently such proceedings are of no force or effect. Freeman on Judgments (4 ed.), vol. 1, sec. 39*a;* 12th vol. Am. & Eng. Ency. of Law, p. 14 and notes.

VIII.

Appellants claim that the court erred in rendering judgment against Harrison and the two banks and not permitting them to participate in the distribution of the assets of the hardware company. The court rendered judgment in favor of plaintiffs against Harrison and the said banks, but directed the money to be paid into the hands of the clerk and be held by him until further orders of the court. If it was intended by the court, which is not clear, that the judgment should preclude the said Harrison and the said banks from sharing in the distribution of said funds, then it is erroneous, as they were entitled to their *pro rata* share. The assets of said hardware company were trust funds for the benefit of all its creditors, and all such are entitled to their respective shares. There is no error in the action of the court in permitting the Baker Wire Company to withdraw *form* the suit. The pleadings of appellant would not have justified the court in refusing the request.

The judgment of the court below is correct in holding the conveyances made by said hardware company to said Harrison void and in rendering judgment against said Harrison for the amount of the assets that went into his hands and against the banks for the amounts received by them respectively, and that said amounts be paid into court for distribution.

All the creditors of said hardware company were entitled to partici-

pate in the distribution of the funds of said hardware company, whether parties to this proceeding or not, and the court below should have rendered judgment for all the creditors who desired to share in the distribution. In failing to do so there was error. The judgment will be here reformed as indicated and the judgment affirmed.

RAINEY,
Associate Justice.

Opinion delivered January 31, 1894.

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(Record, page 265.)

Petition for Writ of Error by Appellants Lyons-Thomas Hardware Company et al.

LYONS-THOMAS HARDWARE COMPANY *et al.*, Appellants, or Plaintiffs in Error,
vs.
PERRY STOVE MANUFACTURING COMPANY *et al.*, Appellees, or Defendants in Error.

To the honorable the supreme court of the State of Texas:

The petition of appellants, The Lyons-Thomas Hardware Company, a private corporation, duly incorporated under the laws of the State of Texas; The Farmers' & Merchants' Bank, The Paris Exchange Bank, both of which are private corporations, incorporated under the laws of the State of Texas; L. P. Harrison, trustee; W. T. Gunn, Jno. C. Gibbons, T. J. Record, J. D. Thomas, C. I. Broad, and N. H. Ragland, Joe Lyons, and Julius P. Record, all of whom reside in Lamar county, Texas, herein styled plaintiffs in error, complaining of appellees, The Perry Stove Manufacturing Company, a foreign corporation, incorporated under the laws of Tenn.; Schoverling, Daly and Gale, a firm composed of August Schoverling, Chas. Daly, and Joseph Gale, citizens of the State of New York; Merchants and Company, a firm composed of Henry W. Merchants and Clark Merchants, both of whom — in the city of Philadelphia and State of Penn.; The Potters Co-operative Company, a foreign corporation, incorporated under the laws of Ohio; The Joseph Hefner Manufacturing Company, a foreign corporation, incorporated under the laws of the State of Mo.; The Miami Stove Works, a foreign corporation, incorporated under the laws of Indiana; The Favorite Stove and Range Company, a foreign corporation, incorporated under the laws of Ohio; The Reading Hardware Company, a foreign corporation, incorporated under the laws of Penn.; J. H. Baun, who resides in the State of Penn.; J. Rosenblatt and Company, a firm composed of J. Rosenblatt, who resides in the city of Baltimore, Md.; J. Patterson and Son, a firm composed of J. Patterson and B. Patterson, both of whom reside in St. Louis, Mo.; The Bronson Supply Company, a foreign corporation, incorporated under the laws of Penn.; The Central Stamping Com-

pany, a foreign corporation, incorporated under the laws of the State of Ill.; Peter Wright and Sons, a firm composed of Peter Wright, Jno. H. Wright, and J. T. Wright, all of whom reside in St. Louis, Mo.; B. Kittridge Arms Company, a foreign corporation, incorporated under the laws of New York; The Junction Arms Company, a foreign corporation, incorporated under the laws of New York; The Alaska Refrigerator Company, a foreign corporation, incorporated under the laws of Mich.; P. Wilson, Sons & Company, a foreign corporation, incorporated under the laws of New York; Alfred Field and Company, a foreign corporation, incorporated under the laws of New York; The Ansonia Clock Company, a foreign corporation, incorporated under the laws of Mass.; Knowles, Taylor and Knowles, a firm composed of J. H. Knowles, R. B. Taylor, and T. S. Knowles, all of whom reside in the city of New York; The St. Louis Shovel Company, a foreign corporation, incorporated under the laws of Mo.; Koeller and Schmitz, a firm composed of J. Koeller and C. Schmitz, both of whom reside in the city and State of New York; Griswold Bros., a firm composed of Wm. Griswold and J. P. Griswold, both of whom reside in the city and State of New York; Bristol Brass Clock Company, a foreign corporation, incorporated under the laws of Conn.; The Superior Barbed Wire Company, a foreign corporation, incorporated under the laws of Wis.; The Henry Sears Company, a foreign corporation, incorporated under the laws of Mass.; The Phillips, Burtoff Manufacturing Company, a foreign corporation, incorporated under the laws of Mass.; Manning, Bowman and Company, a firm composed of J. W. Manning, J. R. Bowman, and Wm. Johnson, all of whom reside in the State of Ill.; The Racine Hardware Company, a foreign corporation, incorporated under the laws of the State of Wis.; Peck, Stowe and Wilcox, a firm composed of Wm. Peck, J. H. Stowe, and James Wilcox, all of whom reside in the State of Ill.; Hubbard and Company, a firm composed of J. R. Hubbard and R. Wilson, both of whom reside in the State of Ill.; Adolph Kastor Bros., a firm composed of Adolph Kastor, Wm. Kastor, and Henri Kastor, all of whom reside in the State of Ill.; The Consolidated Manufacturing Company, a foreign corporation, incorporated under the laws of the State of Ill.; The Quincy Show Case Company, a foreign corporation, incorporated under the laws of the State of Ill.; The Ferris Hame Company, a foreign corporation, incorporated under the laws of the State of Iowa; The Paint Bottle Works, a foreign corporation, incorporated under the laws of the State of Ill.; J. Leopold and Company, a firm composed of J. Leopold and M. Robinson, both of whom reside in the city of Baltimore, Md.; J. R. Torry and Company, a firm composed of J. R. Torry and Wm. Torry, both of whom reside in the State of Md.; Stephens and Company, a firm composed of J. R. Stephens and Wm. Black, both of whom reside in the State of Mass.; F. Myrose and Company, a firm composed of F. Myrose and James Smith, both of whom reside in St. Louis, Mo.; The Brumwell Brush and Wire Goods Company, a foreign corporation, incorporated under the laws of the State of Iowa; R. Wallace and Sons, a firm composed of R. Wallace, James Wallace, and F. Wallace, all of

whom reside in the State of Indiana; Simpson, Hall, Miller and Company, a firm composed of James Simpson, R. Hall, J. R. Miller, and Wm. Fish, all of whom reside in the State of Iowa, herein styled defendants in error, whose attorneys of record are Hale and Hale and T. S. Hill, all of whom reside at Paris, Lamar county, Texas, shows unto the court that the nature of appellants' case is as follows: This suit was originally brought Nov. 20, 1889, by appellees Perry Stove Manufacturing Company and six other simple contract creditors of the Lyons-Thomas Hardware Company, in the district court, Lamar county, Texas, in what they term a "creditors' bill," setting up that the said hardware company was an insolvent, private corporation and had, on Nov. 9, 1889, executed to L. P. Harrison, trustee, three mortgages to secure certain debts covering all of its property and giving preferences; that the Baker Wire Co. had sequestered a part of the assets, making the hardware Co. the trustee and the Baker Wire Company parties, and praying for an injunction; that a receiver be appointed; that the mortgages be set aside and the fund distributed as a trust fund among the creditors without preferences.

That a temporary injunction was granted by the district judge, at chambers, November 20, 1889, and notices ordered to be issued for all of said parties to appear before him, at Clarksville, Texas, on November 29, 1889, to answer said petition and show cause, if any they have, why a receiver should not be appointed as prayed for. For convenience of parties, and without objection, the application was heard at Paris, Texas; that upon the hearing, November 29, 1889, all the defendants answered under oath and the creditors secured under the first mortgage made themselves parties and, with the trustee, set up the mortgages and prayed that he be allowed to administer the trusts and to execute the same under the direction of the court, and the case was fully heard before the court upon the questions growing out of the application for injunction and receiver, and the court rendered its judgment dissolving the injunction, declaring the mortgages to be valid and the securities good, refusing the plaintiffs' application for a receiver, and granting the application of the defendants and intervenors that the trustee, L. P. Harrison, be allowed to administer the trust under the order and direction of the court in the nature of a receiver, ordering that he execute bond in the sum of $85,000, conditioned that he would faithfully execute the trusts and pay over to the secured creditors the money as in the mortgage directed, appointing appraisers to inventory and appraise all of the said property, and directing that the trustee make his report at the next regular term of the district court, and directing the clerk to enroll the decree upon the minutes of the court. This decree was duly signed by the judge and enrolled by the clerk, and at the following term, no objection being made thereto, it was duly approved and signed with the other minutes of the court and became one of its judgments and decrees; that the trustee gave bond for $85,000, as required; the inventory was duly filed and approved, and the trustee administered the trust under the direction and orders of the court, sold the property

and paid the proceeds upon the mortgage debts as ordered and directed by the court, and at the following term filed *filed* his accounts, showing how he had executed the same, and asked to be discharged.

That the plaintiffs took no further action in the case and made no effort to have the decree of the court set aside, but acquiesced therein until all the property had been sold and the proceeds applied to the payment of the secured debts under the order of the court, when, on August 7, 1890, the plaintiffs and a number of other creditors filed what *the* termed "a first amended original petition," setting up that Schovelling, Daily & Gales and eighteen other creditors of the Lyons-Thomas Hardware Company had obtained judgments against it; that the mortgages were invalid and the trustee had refused to pay any except the secured debts; that the members of the hardware Co. owed large amounts of unpaid stock; that the court had rendered its decree and directed that the trust be executed by the trustee, L. P. Harrison, under the direction of the court, and that he gave bond for $85,000, which he did give; that he had wasted the funds, and praying judgment against him on the bond; that the funds be divided, &c.

On March 30, 1891, the plaintiffs filed a second amended original petition, in which they seek judgment setting aside the mortgages and against the trustee for conversion, waste, and devastavit, and also against the stockholders of the corporation for unpaid stock, and, without alleging any payments by the trustee, asks judgments against the two banks and L. P. Harrison. The answers and pleas of intervention set up the mortgages and their validity and the execution thereof by the trustee under the orders of the court.

The case was tried before the court, and on April 9, 1891, the court overruled the demurrer and exceptions of the defendants and intervenors to plaintiffs' petition and sustained the plaintiffs' demurrer and exception to the answers of defendants' pleas of intervention by intervenors, to which they excepted, and rendered judgment in favor of plaintiffs against the trustee, L. P. Harrison, for $57,529.44, the full amount of the proceeds of the sale of the property, less his costs, expenses, and commission of selling; also a judgment in favor of plaintiffs against the Farmers' & Merchants' bank for $48,193.70, the amount of said money paid to it by said trustee on it- debt; also a judgment against the Paris Exchange bank for $7,508.10, the amount of said money paid to it by said trustee on its debt, decreeing that the mortgages were void, that the fund be paid into court, dismissing the Baker Wire Co. from the case, &c. Defendants and intervenors in open court excepted and gave notice of appeal, filed their statement of facts, appeal bonds, and assignments of error, and took the case up by appeal.

A certified copy of which judgment and appeal bonds *are* shown by the transcript accompanying this petition. The case was transferred to and determined by the court of civil appeals for the 5th supreme judicial district of Texas; that on the 31st day of January, 1894, the said judgment of the district court of Lamar county was reformed and affirmed by the court of civil appeals of the fifth

supreme judicial district of Texas. A certified copy of the judgment of said court of civil appeals, together with a certified copy of the opinion of said court and its conclusions of law and fact, *as* shown by the transcript accompanying this petition. Appellants, or plaintiffs in error in this cause, pray this honorable court to grant them a writ of error and a rehearing in this cause upon the following grounds, to wit:

The court of civil appeals erred in overruling appellants' first and fourteenth and fifth assignments of error, denying the Lyons-Thomas Hardware Company the same rights as an individual in disposing of its property by way of mortgage to secure its debts, and in holding that the question certified in this case by the court of civil appeals for the second supreme judicial district of Texas to the supreme court of Texas, which is as follows: "Whether or not a preferential deed of trust executed by a private trading corporation chartered in July, 1884, under general laws, after it has become insolvent and consequently ceased to carry on its business, without any intention of resuming the enterprise, is void as against the unsecured creditors of such corporation," was based upon findings of the court fully sustained by the evidence in the record, and that the answer of the supreme court of Texas to this question, to the effect that the attempted preference would be invalid as to the other creditors of the corporation, was conclusive and settles the proposition raised by these three assignments against appellants, and that therefore the mortgage by the hardware Co. to secure appellants was void for the reasons, 1st, the question certified to the supreme court was an abstract question. How the question arose in the record and the evidence in the record upon which the same was predicated was not stated in the certificate so that the question or case presented by the record could be decided by the supreme court; the law authorizing such certificate is unconstitutional and is a proceeding "without due process of law." 2nd, the question raised by appellants' 1st and 5th assignments of error are not necessar-y concluded by an answer to the question raised by the fourteenth assignment of error. 3rd, the evidence in the record does not sustain the finding of the district court or the question as certified to the supreme court. The first assignment of error calls in question the action of the court in overruling the general demurrer filed by the two banks and W. T. Gunn and others to appellees' second amended original petition. The effect of this demurrer was to challenge the legal sufficiency of appellees' petition in stating a cause of action against the banks and the other parties. The fifth assignment of error calls in question the action of the court in sustaining the appellees' (plaintiffs below) demurrer to the answer of the two banks and W. T. Gunn and others, which answer was as follows:

"That they are and were *bona fide* creditors and mortgagees of the defendants The Lyons-Thomas Hardware Company for a valuable consideration without notice of plaintiffs' claim and without notice that the said hardware Co. was insolvent or without notice of any fraud on the part of said company, and they here refer to and

adopt their pleas of intervention and answers heretofore filed and the allegations therein as and for their special answer to plaintiffs' amended petition as far as the same is pertinent and applicable; that the mortgage executed by said hardware Co. for the benefit of these defendants was executed prior to the other alleged mortgage; that said hardware Co. mortgaged and pledge- a portion of its property to these defendant- to secure them, as is alleged in their plea of intervention; that when they took possession of the property they had no notice of any other mortgage or deed of trust; that on the 29 day of November, 1889, the judge of this court made an order in this cause, being then a proceeding for an injunction and a receiver by plaintiff and application in said proceedings by these defendants, to allow the trustee named in said mortgage to execute and settle the same under the orders and directions of this court, by the terms of which order said trustee was to take possession of said mortgaged property and to sell the same and pay over the proceeds to the party secured by said mortgage according to their respective rights, and the balance to pay into court; that plaintiff and the Baker Wire Co. were parties voluntarily to such proceedings; that said order and judgment was ordered to and has been entered upon the minutes of this court and is a part of the record of this cause, and has never been vacated or set aside, but is in full force."

The undisputed evidence in the record shows that at the time the chattel mortgage was given by the Lyons-Thomas Hardware Company to secure the two banks and W. T. Gunn and others it only embraced a part of the company's property; that the president and other officers of the company then thought the company solvent; that they had no intention or idea of the company ceasing to prosecute its enterprise, but believed that they would be able to arrange their matters and "go ahead." See testimony of Julius P. Record, Tr., 183, and testimony of Joe Lyons, Tr., 192.

2nd. The said court of civil appeals erred in overruling appellants' 2d, 6th, & 7th assignments of error, and in holding that simple contract creditors could maintain a creditors' bill against an insolvent corporation and other parties holding *leins* on the property of the corporation to set such lien aside, and in holding that the following allegation, "the above-named plaintiffs, with many others, being creditors of the Lyons-Thomas Hardware Company, whose names, the amount of their respective claims, the rate of interest, and whether judgment creditors or otherwise will be shown in Exhibits A, B, C, and D," was sufficient, as it showed plaintiffs to be creditors of the company, because an exhibit cannot take the place of an allegation nor relieve the pleader from the necessity of making the proper allegation upon which to base a recovery.

3rd. The said court of civil appeals erred in overruling appellants' third assignment of error, which raised the question of the misjoinder of causes of action, and in holding that it was unnecessary to determine whether the ruling of the court was erroneous or not, and in holding that no harm was done appellants by such ruling, because there is directly presented the question whether a suit against a trustee for devastavit misapplication of trust property can

be joined with an equitable suit to follow the property or its proceeds into the hands of third parties. It was alleged in plaintiffs' petition that the trustee, Harrison, had been guilty of waste and devastavit in selling the property under the order of the court, and judgment was sought and obtained against him on this ground, and this alone, for the full amount he received for the property, less his expenses and commission, which were allowed by the court—a judgment against him for obeying the order of the court—while at the same time allowing him his commissions and expenses in carrying out this so-called void order. This judgment is without a precedent and is for $57,000, yet in the opinion of said court no harm was done any of the appellants.

4th. The said court of civil appeals erred in overruling appellants' fourth assignment of error and in holding that the beneficiaries in a deed of trust which was sought by a suit to be set aside and declared void were not necessary parties to such suit, and the court erred in holding that in such suit the trustee alone represents them all and can defend for all, and that the deed of trust can be set aside and declared void in a suit against the trustee alone. This holding is in direct opposition to the decree of the supreme court of Texas, and the case of Preston *v.* Carter Bros., cited by the court of civil appeals, is not in conflict with former decisions, as that was a general assignment in that case and is one of the exceptions to the general rule as stated in the former decisions.

5th. The said court of civil appeals erred in overruling appellants' 9th assignment of error and in holding there was no error in the district court below in permitting the witnesses L. P. Harrison and T. J. Record to testify, over objections of appellees, that the proceeds of the trust property was paid over to the F. & M. bank and Paris Exchange bank, because there were no pleadings to authorize such evidence. There was no allegation that either of the banks had received a dollar of said trust money.

6th. The said court of civil appeals erred in not reversing the case on appellants' 10, 11, 12, and 13 assignments of error. The findings of the trial court that the Lyons-Thomas Hardware Company was entirely insolvent at the time it executed the deeds of trust and the mortgage to secure appellants was against the evidence.

The undisputed evidence in the record, the testimony of Record and Lyons, shows that it was not insolvent. The finding of the district court that the entire assets of the company amounted to $60,306.75 is directly in the face of the undisputed evidence of L. P. Harrison, who testified that the stock was invoiced at cost, and carriage, $70,000; that the company had two storehouses in Paris, Texas, worth $6,000 or $7,000 each, and other property, real estate, notes, and accounts, and the finding of the trial court that at the time said Lyons-Thomas Hardware Co. executed the mortgage it intended to cease doing business and did not longer intend to carry out the object and purposes for which it was created was without any evidence to support it. All the evidence on this point in the record is the testimony of Joe Lyons and Julius P. Record, who tes-

tified that it was the expectation and the intention of the officers of the company at the time the mortgage was given to arrange the business of the concern and "go ahead."

The district court was requested to find in accordance with the evidence, which he refused, and appellants took bill of exceptions. The court of civil appeals, by motion of appellants, was requested to file its conclusions of law and fact, but it adopted the findings of the district court.

7th. The court erred in overruling appellants' 15th assignment of error, erroneously called 14th in the opinion, and in overruling the 6th and 7th assignments of error of the appellant L. P. Harrison, and in holding that the order of the district judge of Lamar county of date November 29, 1889, appointing the said L. P. Harrison as trustee or custodian or receiver of the property of the Lyons-Thomas Hardware Co., and ordered him to sell said property, pay off preferred debts, and pay the balance into court, and that he settle with and account to the court for his action in the premises, was absolutely void, and that the judgment against said Harrison for $57,529.44 was not erroneous, because said order having been in a proceeding commenced by appellees for an injunction and the appointment of a receiver and the jurisdiction and power of the judge of the court having been rightfully called into action and having once attached, its orders could at most only be voidable or erroneous. The court had, prior to this order, granted an injunction in the case on the petition of appellees and cited appellants or a part of them to appear on the 29th day of November, 1889, and show cause why a receiver should not be appointed. At the hearing the beneficiaries in the mortgage intervened and asked the court to take charge of the trust, require the trustee to inventory the property and give bond, order the property sold for its preservation, and require the trustee to carry out the trust under the direction of the court, and that the injunction be dissolved. At this hearing and under these proceedings the order was made which this court holds to be a nullity. Besides, this error in pursuance of the statute was entered upon the minutes of the court at the next term, was acquiesced in by appellees and no attempt made to set it aside until it was carried out, was recognized by the court both in vacation and term time in giving directions to the trustee ordering him to pay out money and approving his accounts, and was recognized in the final judgment by allowing Harrison his commission and expenses and approving his final account, yet the court rendered judgment against him for nearly five thousand dollars more than the entire proceeds of the property after deducting the expenses allowed, and the court of civil appeals affirms that judgment. The order of the court in vacation could not have been absolutely void. It might have been erroneous or voidable and subject to be set aside, or it might have been void in part; but certainly so much of the order as was for the preservation of the property and converting it into money could not be void.

8th. The said court of civil appeals erred in overruling appellants' 16th and 17th assignments of error and in holding that judgments

were properly rendered against the Farmers' & Merchants' bank and Paris Exchange bank. There was no allegation in plaintiffs' petition or pleading to authorize such judgments against said banks for any amount whatever. The petition in this case was not even a bill of discovery which has been rendered obsolete by the statute which authorized the taking of depositions of parties to suits. It was an attempt to follow trust funds into the hands of third parties. In order to show a cause of action against these third parties it was necessary to allege that they had received such trust funds with notice stating the amount they had received, either alleging it as a fact or stating it upon information and belief. The only allegation in the petition bearing upon this question is as follows: "Plaintiffs further state that they are not sufficiently informed as to whether the said L. P. Harrison has or has not paid off any of said preferred claims or any part thereof, to allege that he has or has not done so, but they allege that if any payment has been made by him out of the assets of said hardware company to any preferred creditor or creditors, or to any other person, the creditor or person who received it did so with full knowledge of the pendency of this creditors' bill, and that no such payment or payments were made, if at all, until subsequent to the 29th day of November, 1889, and was paid to a person or persons then defendant or defenda-ts, intervenor or intervenors in this bill." This stated no cause of action whatever, either legal or equitable, against the banks and is what our Supreme Court denominates a "fishing bill"—see Ewing *v.* Duncan, 81 Tex., on p. 237—and the judgments against said banks is without due process of law. Appellants demurred to this pleading, which was overruled, and assigned it in their 1st assignment of error, and object to the evidence for the same reason, which was overruled, and they excepted and assigned it in their 9th assignment of error.

9th. The court of civil appeals erred in overruling appellants' 19th assignment of error and in overruling the 8th and 9th assignments of appellant Harrison, and in holding there was no error in the court below in permitting the Baker Wire Company to withdraw from the suit, because the record shows that said Baker Wire Company voluntarily made itself a party to the proceedings, joined in the application for the appointment of a receiver and to administer the property of the hardware company as a trust fund for the payment of its creditors, which was absolutely inconsistent with its claims to specific property, and the court below on the trial allowed it to withdraw its pleadings and appearance in this case without prejudicing its rights to prosecute its suit for specific property after the property had been sold under the order of the court and after appellants, including the trustee, had filed pleadings over against the said Baker Wire Company and the other appellees setting up *res adjudicata* and praying that these orders and judgments of the court against all the appellees, including the Baker Wire Co., be held *res adjudicata.*

10th. Because the said court of civil appeals erred in its judgment affirming and reforming the judgment of the district court in

this: L. P. Harrison was recognized by the district court as its trustee or officer under bond and under its orders, and even up to the final approval of his accounts, in allowing his commissions for the sales made by him under the orders of said court, and yet the said court of civil appeals affirmed the judgment against him by appellees for the entire amounts paid out by him under the orders of the court, with interest thereon, which amounts to more than he paid out, together with his commissions thereon, and without protecting him or the other appellants from the suits of the Baker Wire Co., Edward Miller & Co., L. Waterberry & Co., Wilcox Silver Plate Co., Meriden Cutlery Co., and Ferris Hame Co., brought against said trustee, Harrison, and the other appellants in this cause for the recovery of specific portion of said property, aggregating the sum of nine thousand three hundred and eighty-five ($9,385.00) dollars, which had already been sold under the orders of the district court, and the proceeds of which he is required to account for and pay over in this case, leaving nothing in his hands to pay with if they should recover against him.

The court of civil appeals should have reversed the judgment of the district court and have required said parties to intervene in this suit that their claims to specific portions of said property so sold under the orders of said court could be adjudicated and settled in this suit, to the end that if said trustee, Harrison, is liable for the full amount of the proceeds of the sale of said property that he shall not be required to account for said assets twice.

These appellants, or plaintiffs in error, would further show that these errors complained of arise upon questions of law, a determination of which *were* necessary to the decision of the cause in the court of civil appeals, and that said questions were properly raised by assignments of error and properly presented to said court, and that after the decision and judgment rendered by said court of civil appeals in this cause and within the time prescribed by law the appellants, or plaintiffs in error herein, made a motion for a rehearing in said court of civil appeals, presenting distinctly all the points upon which a writ of error is now asked, and that said motion has been overruled by said court of civil appeals. A certified copy of said motion for rehearing, together with a certified copy of the order and judgment of said court overruling the same, is shown in the transcript which accompanies this petition.

Wherefore appellant-, or plaintiffs in error, pray that a rehearing be granted them in this cause, and that this court grant a writ of error to the said court of civil appeals for the 5th supreme judicial district of Texas, returnable as the law directs, and that the judgment of the said court of civil appeals and of the district court of Lamar Co., Texas, be reversed and here rendered for appellant-, or plaintiffs in error.

S. B. MAXEY,
DENTON & LONG,
DUDLEY & MOORE,
Attorneys for Appellant-, or Plaintiffs in Error,
Lyons-Thomas Hardware Company et al.

Petition for writ of error granted March 26, 1894.

Submitted on briefs printed and oral arguments for all parties April 27th, 1894.

(Record, page 284.)

Opinion of Supreme Court on Writ of Error.

LYONS-THOMAS HARDWARE CO. *et al.*, Plaintiffs in Error, *vs.* PERRY STOVE MANUFA-TURING COMPANY *et al.*, Defendants in Error.	No. 145. From Lamar County, 5th District.

The district court found conclusions of fact which were adopted by the court of civil appeals, and are in substance as follows:

The Lyons-Thomas Hardware Company, a private corporation organized under the laws of Texas, being insolvent, on the 9th day of November, 1889, made three deeds of trust, by which it conveyed to L. P. Harrison all of its property and assets of every kind to secure certain-named creditors, L. P. Harrison, The Farmers' & Merchants' Bank of Paris, The Exchange Bank of Paris, and others, who are defendants, being embraced in the deeds, as well as some who are not parties to this suit.

The corporation owed more than $100,000.00 and the amount realized from its assets was $60,306.57. There was a large amount of its debts that were not secured by these deeds of trust. The Baker Wire Company sued out against the trustee a writ of sequestration, seizing a part of the property transferred.

Perry Stove Manufacturing Company and other simple contract creditors filed suit in the district court of Lamar county against the Lyons-Thomas Hardware Company, L. P. Harrison, Baker Wire Company, and the officers and stockholders of the corporation, the Lyons-Thomas Hardware Co. seeking to set aside the deeds of trust and have the property distributed to pay all the debts of the corporation, to recover of the stockholders the amounts unpaid on their stock, and praying an injunction against the trustee to prevent and enjoin the sale and disposition of the property under the deeds of trust. The petition also asked the court to appoint a receiver for the corporation.

The district judge granted a temporary writ of injunction and set the hearing of the application for a receiver for the 29th day of November, 1889, in chambers. The creditors secured by the first mortgage or deed of trust filed a plea of intervention setting up their debts, and they and the Baker Wire Company filed answers under oath; the latter joined in the prayer for receiver. The Baker Wire Company subsequently, by leave of the court, withdrew its answer and was dismissed from the suit.

Upon hearing in vacation the judge refused to appoint a receiver, but declared that the deeds of trust were valid, and, upon the prayer of the trustee and creditors, ordered that the trustee, Harrison, proceed to administer the trust under the deeds of trust, that he give

bond in the sum of $85,000, conditioned that he would faithfully execute the trust and pay over to the secured creditors the money as in the deeds of trust directed; appointed appraisers to inventory the property, and directed the trustee to make report at the next regular term of the court. The clerk was ordered to record the decree upon the minutes of the court, which was done. The minutes were approved by the court at the next term and signed, embracing the decree made in vacation. The trustee gave the bond, which was approved, the inventory returned, the property sold, and the proceeds applied by him to the payment of the secured debts as directed by the court; he made his report at the following term and asked that he be discharged. At the time the order was made in vacation the plaintiffs excepted, took a bill of exceptions, signed by the judge, and filed it among the papers of the case. Nothing further was done by the plaintiffs until in October, 1890, when a first amended original petition was filed, alleging that they and a number of others had recovered judgments against the Lyons-Thomas Hardware Company. This petition repeated the allegations of the former petition and alleged that the trustee had wasted and mismanaged the estate, praying judgment for the distribution of the funds among all the creditors.

Other pleadings were filed subsequently which will be noticed in so far as they affect the questions presented under the different assignments of error.

Upon final trial before the court the deeds of trust were held to be void and judgment was entered against the trustee, Harrison, for funds that came into his hands, less his commissions and costs of administering the trust, and against the Farmers' and Merchants' bank and the Paris Exchange bank, each for the sum paid to it. The judgment of the district court was reformed and affirmed by the court of civil appeals, and the plaintiffs in error present the case to this court upon objections to the judgments of the district court and court of civil appeals, embracing in substance these propositions:

First. That the court erred in holding that an insolvent corporation could not make a valid mortgage with preference to a portion of its creditors.

Second. That the undisputed evidence shows that the Lyons-Thomas Hardware Company was not insolvent, and the court erred in so finding.

Third. That simple contract creditors could not maintain this character of suit.

Fourth. That there was a misjoinder of causes of action.

Fifth. That all of the beneficiaries in the deeds of trust were necessary parties to this suit.

Sixth. That the court erred in admitting evidence as to the money paid by Harrison to the Farmers' and Merchants' bank and to the Paris Exchange bank, because there was no allegations to permit it, and that the court erred in entering judgment against said banks.

Seventh. The court erred in entering judgment against Harrison and holding that the order appointing him was void.

Eighth. The court erred in permitting the Baker Wire Company to withdraw from the case.

In this case, upon a question certified by the court of civil appeals, this court held that an insolvent corporation which had ceased to do business or which, by the making of an instrument conveying all its property, incapacitates itself for continuing its business, cannot make a mortgage or deed of trust by which it gives a preference to some of its creditors over others (Lyons-Thomas Hardware Co. *vs.* Perry Stove Mfg. Co., 24 S. W. Rep., 16). We see no reason to change our opinion on that question.

It is asserted by plaintiffs in error that there was no evidence to sustain the conclusion of the court that the Lyons-Thomas Hardware Co. was insolvent at the time the deeds of trust were executed. It is true that some of the officers of the company stated that it was not insolvent at that time; but the evidence shows without doubt that the company was largely indebted; that to secure a part of its creditors only it conveyed and delivered to Harrison, trustee, all of its assets, with power to convert them into money and to apply the money to the payment of the debts named. If there was more than sufficient to pay all, why convey its entire property to secure the payment of a portion of its debts, leaving a large amount unprovided for? By these acts which occurred within a few hours of each other it declared in most unmistakable terms its inability to pay its debts, terminated its business, and, having not a dollar with which to buy another stock of goods, no hope of resuming could exist except upon the bare contingency of making a compromise with its creditors. There was not only evidence to sustain the conclusion that it was insolvent and had ceased business without expectation of resuming, but the court could not, in our judgment, have found otherwise consistently with the facts.

This was a suit to restore funds to the trust estate, in which the plaintiffs were beneficiaries, and the making of the deeds of trust by the insolvent corporation was a violation of the trust which the law raised upon its solvency and to place the property in the control of the court. Plaintiffs had a right to maintain the action whether they had judgments or not (Dimmock *vs.* Bixby, 20 Pick., 377). We do not deem it necessary to discuss this question at length for the reason that the second amended original petition, upon which the case was tried, alleged that all of the plaintiffs had recovered judgments during the pendency of the suit. If there was a defect in this particular in the original petition, which we do not believe to be true, the amendment cured it.

Plaintiffs in the second amended original petition set up that the stockholders owed large amounts for their stock, but did not pray judgment against them and no judgment was entered against them. The petition sought to recover for the benefit of all the creditors of the corporation the value of the property that went into Harrison's hands and the amounts paid to himself and to the two banks.

These rights all grew out of the making of the deeds of trust and the proceedings thereunder in court. They were properly joined.

When the Lyons-Thomas Hardware Company, being insolvent, ceased to carry on its business, the law made its assets a trust fund to be held and administered by its officers & the courts for the benefit of all of its creditors. Each creditor became a beneficiary in that fund. The distribution was to be made under the law and not under the deeds of trust that the company executed.

The deeds of trust in this case committed the fund to the possession and control of Harrison, with full power to sell the property and distribute the proceeds among the creditors. The Lyons-Thomas Hardware Company parted with the control of the property, and the trustee could maintain suits to recover it and defend actions brought against him for its possession or which brought in question his right of control.

We believe that reason and authority sustains the proposition that in a suit to set aside such an instrument the beneficiaries in the deeds of trust were not necessary parties, and that the trustee represented all creditors for the purpose of sustaining the deeds under which he held for their benefit. (G. H. & S. A. R'y Co. *vs.* Butler, 56 Tex., 511; Ebell *vs.* Bursinger, 70 Tex., 120; Kennison *vs.* Stewart, 93 U. S., 155.)

The reason assigned in support of the rule requiring beneficiaries to be made parties where the object is to participate in the fund under the instrument by which the trust is created do not apply in this character of case. When it is sought to construe an instrument and enforce it the trustee is entitled to have the rights of all the parties interested determined in order that he may be protected in the execution of the trust. He does not represent any of the beneficiaries so far as the rights between them and other beneficiaries are concerned, but is supposed to be indifferent in this respect. The beneficiaries named in the deed as well as all others entitled to participate in the fund have the right to be heard for the purpose of establishing their own rights as well as to contest the claim of any other asserting a right to any part of it. As before said, the object of this suit was not to distribute under but to set aside the deeds of trust and make division according to the law.

In Ebell *vs.* Bursinger, *supra*, the deed of trust conferred such limited powers upon the trustee that this court held that he was not empowered to institute and maintain suits alone with reference to the property. The general rule is announced in that case that in a suit "by or against the trustee for the recovery of the trust property the beneficiary is a necessary party." The decision recognizes the exceptions to this rule and cites the case of a general assignment, in which it is held that the assignee may sue or be sued alone so far as the possession of the property is concerned. In that case the decision was placed distinctly upon the ground that the trustee had not such power as would enable him to sue alone for the property nor such as would authorize a suit against him alone. It cannot be doubted that a trustee with the authority granted by these

instruments could sue for the possession of the property conveyed to him thereby.

In Hudson *vs.* Milling & Elevator Co., 79 Tex., 401, it was sought to have an instrument claimed by the trustee and beneficiaries named in it to be a mortgage declared to be a general assignment and to annul the preference therein provided for. Plaintiffs sought to enforce this instrument as reformed and claimed under it an interest in the fund antagonistic to the named creditors. It was held that the creditors named in the instrument were necessary parties to the suit. We adhere to this as a correct practice in that class of case, and in so far as Preston *vs.* Carter Bros., 80 Tex., 388, is in conflict with the doctrine announced in Hudson *vs.* Milling & Elevator Co. upon this point the former case is overruled.

In every case where the beneficiaries are entitled to participate in a trust fund in proportions not fixed by the instrument, before the court can declare the part to which any one of them is entitled, notice must be given to all the beneficiaries, if known; if not known or if they are too numerous to be made parties, then the court can give such notice and take such action as will enable them to present their claims for adjustment. The fund in this case is under the control of the court, and there are many creditors scattered throughout different States. The court should, before making distribution of that fund, give — notice as is practicable that each may present his claim before the court for inquiry and adjudication. This suit was brought with a view to that end and so alleges its purpose to be.

The beneficiaries named in the deed of trust which attempted unlawfully to create a trust in a trust fund were not necessary parties to this suit, which was prosecuted for the purpose of restoring the fund to its lawful purposes.

The Farmers' and Merchants' bank intervened in this suit, and the Paris Exchange bank became a party defendant. Each set up its debt against the Thomas-Lyons Hardware Company, claiming that the same should be paid by the trustee, and asking the court to order the payment to be made by him. The court continued the trustee (in fact, appointed him as receiver) and took control of the property, ordered that he sell the property and pay the proceeds to the creditors preferred as directed in the deeds of trust. The trustee sold the property and reported the payments to the two banks, which is not controverted. The plaintiff filed his second amended original petition, alleging in substance that they were not sufficiently informed as to whether payments *and* been made by Harrison to the banks to enable them to allege the fact of payment nor the amount so paid, but prayed that the two banks be required to produce in court the money paid to each.

The fact of payment and the amount paid to each were matters peculiarly within the knowledge of the banks and Harrison, and in the nature of things not known to the plaintiffs. The allegations were sufficient to notify the banks of what was sought to be enforced against them (R'y Co. *vs.* Brinker, 68 Tex., 502; Lewis *vs.* Alexander, 51 Tex., 585). In Lewis *vs.* Alexander the court said:

"The same strictness of pleading should not be required of plaintiff, who is not presumed to have a particular knowledge of the agreement, that would be required of a party to it." The court had a right to order parties to the proceedings to restore to the possession of the court the money which had been placed in their hands by an order of the court that was held to have been void or wrongfully entered, the cause being still in course of adjudication.

The evidence of payment by Harrison to the banks was properly admitted under the pleadings and the circumstances of this case.

Plaintiffs in error claim that the district court erred in entering judgment against L. P. Harrison for the proceeds of sale of the property in his hands, the greater part of which he had paid to the Farmers' and Merchants' and the Paris Exchange bank- under the order of the court.

The correctness of the judgment depends upon the validity of the order of the court made in vacation. If the court had the power to make that order in vacation, then, no matter how irregular it might be, the officer would not be liable for obeying it. If, however, the court had not that power, the order would be void and would afford no protection to Harrison. He was bound to know the law and must act at his peril in the execution of a void order if the invalidity arises from want of power in the judge to make the order at the time it was made. (Freeman, Judg'ts, sec. 229; Freeman, Ex., sec. 100; Gurney *vs.* Tufts, 37 Mass., 130; 58 Am. Dec., 777; Howard *vs.* Clark, 43 Mo., 344; Laughlin *vs.* Peckham, 66 Iowa, 121.)

Under art. 1461, Rev. Stat., the district judge had authority to appoint a receiver in vacation, but no statute gave him power to appoint a trustee in vacation. The judge refused to appoint a receiver, but, on application of Harrison and the preferred creditors, authorized Harrison as trustee to execute the trust in accordance with the deeds, and required him to give bond in the amount prescribed by the judge to return an inventory of all property in his hands as trustee and to report to the next term of the court his action. It also declared the deeds of trust valid, and ordered the trustee to pay over the proceeds of the property to the preferred creditors according to the directions of the deeds of trust; thus the judge took control of the property and made the trustee, as he was termed, amenable to the court. If the judge had appointed Harrison receiver the same things would have been required of him as were required by this order. He must, as receiver, give bond, as prescribed by the judge, to return an inventory and report to the court. The conditions of the bond are not exactly such as are required by the statute; but that was merely irregularity and would not avoid the appointment as receiver. He was called trustee instead of receiver; but courts will look to the substance of the action had, what it accomplished, and not to the particular terms used to denominate the character of the officer appointed. Harrison was in fact and law appointed receiver by the judge, and if the court in a receivership could enter the order under which he acted he would be protected in this case.

A judge of the district court in this State has no power to adjudicate the rights of litigants except at the times and places prescribed by law for holding courts unless the authority is conferred by statute. (Hunton *vs.* Nichols, 55 Tex., 225; Doss *vs.* Waggener, 3 Tex., 516; Hodges *vs.* Ward & Ingram, 1 Tex., 244; Black, Judg'ts, sec. 179; Freeman, Judg'ts, sec. 121; Hammock *vs.* Loan and T. Co., 105 U. S., 77; Kimports *vs.* Ransom, 29 W. Va., 496; 12 Am. & Eng. Enc. of Law, p. 14; Laughlin *vs.* Peckham, 66 La., 121.)

Hodges *vs.* Ward, cited above, is very much in point. A mandamus was applied for against a collector of customs to compel him to deliver goods to the plaintiffs. The judge heard the application in vacation and ordered the collector to deliver up the goods. The order was held to be absolutely void. In this case the order which adjudged that the deeds of trust were valid and ordered the proceeds to be paid on the preferred debts adjudicated in vacation the very matter in controversy. The statutes of this State do not invest the judge of the district court with such authority, and the order was a nullity. The court rightly rendered judgment against Harrison for the money that came into his hands derived from the sale of the property.

The judgment of the court against Harrison was for the amount that he had paid the two banks and his own claim, besides a small balance remaining in his hands, allowing him his expenses and commissions. It provides for crediting Harrison with the amounts to be paid by the banks, when paid, and no injustice is done him. The money is ordered to be paid to the clerk, to be held subject to the future orders of the court, and Harrison can be protected in all particulars that *is* consistent with the rights of others in the disposition of that fund.

Before this suit was instituted the Baker Wire Company filed a suit against Harrison to recover some of the property held by him under the deeds of trust. It was made a party to this suit and joined in the prayer for appointment of a receiver and was subsequently permitted to withdraw. That company would have had a right to sue Harrison after he was appointed without leave of the court (Rev. Stat., art. 1468), and there was no error in permitting it to prosecute its suit already pending. Harrison could make every defence in that case to which he was entitled, and if he is entitled to protection from the results the court can, in the distribution of the funds, afford him such protection as he may show that he ought to have.

The judgement of the district court as reformed by the court of civil appeals is affirmed, and will be enforced in accordance with this opinion.

T. J. BROWN, *Associate J.*

Opinion delivered June 7, 1894.

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Office Supreme Court, U. S.
FILED.
Sept 3,
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JAMES H. McKENNEY,
CLERK.

717

IN THE

SUPREME COURT of the UNITED STATES

THE LYONS-THOMAS HARDWARE COMPANY, ET AL.,

Plaintiffs in Error.

versus.

THE PERRY STOVE MANUFACTURING COMPANY, ET AL.,

Defendants in Error.

Come now the defendants in error, by their counsel appearing in that behalf, and move the court to dismiss the writ of error in the above entitled cause for the want of jurisdiction, because the judgment or decree from which the writ of error purports to have been taken, is the judgment or decree of one of the United States, to-wit. The Supreme Court of the

State of Texas, and for grounds thereof, state the following:

1. There is no Federal question shown in the record.

2. The record shows that the case was decided upon a non-Federal question on the general principles of law, and especially on the Statute of the State of Texas, no Federal question was presented, but if presented, it was not in the time or in the manner required by law. No Federal question was decided which was necessary to the decision of the case; or that would give this court jurisdiction.

3. Because due process of law has not been denied plaintiffs in error, as is shown by the record, and because the decision of the Supreme Court of the State, construing a State Statute, is conclusive and binding on this court.

4. The record shows that the plaintiff in error, the Lyons-Thomas Hardware Company, is a creature of the Texas Statute, and was a citizen of said State, and that (*is*) is not, and never was a citizen of the United States.

And the said defendants in error by counsel aforesaid, also move the court to affirm the judgment or decree from which said writ of error purports to have been taken, because, although the record in the case may show this court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only.

V. W. HALE,
T. S. HILL,
H. D. McDONALD.
A. P. PARK,
R. L. ROSS,

Attorneys for Perry Stove Manufacturing Company, and all the other defendants in error.

Endorsed—Case No, 16,007. Supreme Court U. S., October Term, 1895. Term, No. 717, The Lyons-Thomas Hardware Co, et al., Plaintiffs in error, vs. The Perry Stove Manufacturing Company, et al. Motion to dismiss or affirm. Filed Sept. 3, 1895.

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JAMES H. McKINNEY,
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717

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1895.

THE LYONS-THOMAS HARDWARE COMPANY, ET AL.,
Plaintiffs in Error,

versus

THE PERRY STOVE MANUFACTURING COMPANY, ET AL.,
Defendants in Error.

ARGUMENT OF COUNSEL FOR DEFENDANTS IN ERROR, ON MOTION TO DISMISS THE WRIT OF ERROR IN THIS CAUSE.

V. W. HALE,
O. P. HALE,
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Attorneys for Perry Stove Manufacturing Company, and all the other defendants in error.

Monitor, Printer, Kepham Street, Paris.

In the Supreme Court of the United States,

October Term, 1895,

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Plaintiffs in Error,

versus

THE PERRY STOVE MANUFACTURING COMPANY, ET AL,

Defendants in Error.

ARGUMENT OF COUNSEL FOR DEFENDANTS IN ERROR, ON MOTION TO DISMISS THE WRIT OF ERROR IN THIS CAUSE.

This was a suit by defendants in error, by general creditors' bill to set aside several chattel mortgages, executed by the Lyons-Thomas Hardware Company, a private trading corporation, to L. P. Harrison, trustee, in which it was attempted to give preferences

to part of the creditors of said corporation, including its officers and stockholders, as indorsers on its paper.

All its assets of every kind and description, real and personal, was conveyed to the trustee, and the corporation, then ceased to do business and have made no attempt to resume, at once ceased to be a "going concern" and was practically and actually dissolved, and made no attempt, nor had it the ability or disposition to resume its business.

The District (trial) Court rendered judgment, declaring the chattel mortgages void for the want of power to execute them, preferring certain creditors. The case was appealed by the defendants to the Supreme Court of Texas, and after the creation of the several courts of Civil Appeals of Texas, it was transferred to the Court of Civil Appeals of the second district, at Fort Worth. Subsequently, and before any disposition was made of it by that court, the legislature passed an "act" authorizing that court to certify any question of law it desired to, to the Supreme Court to be answered. (See acts 22d Legislature, p. 25, Sec. 35, published in Sup. to Sayles' Civil Statutes, Art. 1081 f.) The record shows that the Court of Civil Appeals certified to the Supreme Court the following questions of law, purely:

1st. "Whether or not a preferential deed of trust

"executed by a private corporation, (chartered in July, "1884, under general law), after it has become insol- "vent and consequently ceased to carry on its busi- "ness, without any intention of renewing the enter- "prise, is void, as against the unsecured creditors of "such corporation?"

2d. "If a private corporation under such cir- "cumstances has the same power to prefer its credit- "ors as an individual, whether such preferential deed "is void in law, because of the fact that the stock- "holders, directors and other officers of the corpora- "tion who executed it in the name of the corporation, "are liable as sureties and endorsers on the preferred "claims?"

The case was set down for hearing on the certificate by the Supreme Court on the 25th day of May, 1893, and was argued by counsel on both sides, and the court, speaking through Chief Justice Stayton, unanimously decided the first question in the affirmative. (See the opinion reported in 86th Texas Reps., page 143). The other question was not answered, because not necessary.

The case was then sent to the Court of Civil Appeals, at Dallas, which court in the mean time had been organized, where, in due time, the judgment of the trial (District) court was reformed and affirmed.

Counsel for defendants (plaintiffs in error in this court) then took the case again to the Supreme Court on writ of error, on its merits on the whole case, with the entire record before the court, and it was again fully argued by briefs and oral arguments by the attorneys for both parties, and the opinion of both lower courts "affirmed." Subsequently counsel for plaintiffs in error filed a motion for a rehearing, in which, among other things, they claimed that the law authorizing the Court of Civil Appeals to certify a question of law to the Supreme Court is violative of the 14th amendment to the Constitution of the United States, which is the first pleading ever filed in the cause setting up such a question. The following is a copy of all that part of the motion relating to any federal question:

3d. "Said act of the legislature of the State of "Texas is contrary to the 14th amendment of the Con- "stitution of the United States of America which "provides, among other things, that 'no state shall "make or enforce any law which shall abridge the "privileges or immunities of the citizens of the United "States. Nor shall any state deprive any person of "life, liberty or property without due process of law,' "in this, that the plaintiffs in error having appealed this "case to the Supreme Court of the State of Texas

"prior to the law creating the Courts of Civil Appeals "and prior to the act of 1893 authorizing questions to "be certified to this court by the Courts of Civil Ap- "peals, they were entitled to a hearing and determina- "tion of this case on appeal upon the whole record be- "fore a tribunal authorized by the Constitution to pass "on the same according to the rules and principles "which had been established in our system of juris- "prudence for the protection and enforcement of pri- "vate rights."

4th. "The said act of the legislature of Texas of "1893 authorizing questions to be certified by the "Court of Civil Appeals to the Supreme Court of this "state does not give the parties to the suit in which "the questions are certified any right to be heard as to "what shall be contained in the certified question, nor "is there any provision by which they may controvert "or correct the certificate of the record, nor does it "provide that the party shall be heard on the certified "question in the Supreme Court of the State of Texas, "nor is there any provision in said act or in the "rules of the Supreme Court of the state, requiring "so much of the record of said case filed in the "Court of Civil Appeals as relates to, and is perti- "nent to the very question to be decided by the "Supreme Court, to be laid before the Supreme

"Court, and because when the Supreme Court "decides said question or questions, the Court of "Civil Appeals on final adjudication is bound to de- "cide in accordance with the decision of the Su- "preme Court upon the issue submitted, so that the "final adjudication in the Court of Civil Appeals is "partly based on its own judgment and partly in "obedience to the mandate of the Supreme Court, "thereby depriving the Court of Civil Appeals of the "exercise of its own untrammeled judgment, thereby "defeating its appellate jurisdiction. It is therefore "obnoxious to the 14th amendment of the Federal "Constitution.

5th. "The certified question in this case by the "Court of Civil Appeals upon which the question of "the validity of the chattel mortgage given by the "Lyons-Thomas Hardware Company to secure plaint- "iffs in error was determined and held conclusive by "this court, contains no part of the record, nor does it "show how the question arose, or the facts upon which "it arose; it is a mere abstract question not supported "by the evidence in the record, and was not necessary "to the determination of the cause as shown by the "record."

On the trial or hearing of the certified questions before the Supreme Court, the attorneys for both

parties appeared at a day fixed by the court for the hearing, and by briefs and oral arguments urged the court to decide it according to their respective views. Plaintiffs in error here asked the court to answer the questions in the negative. Defendants in error here asked the court to answer them in the affirmative, which was done, and the case sent back to the Court of Civil Appeals, at Dallas, where the judgment of the lower (District) court was reformed and affirmed, whereupon plaintiffs in error sued out a writ of error and took the whole case upon the entire record before the Supreme Court, where it was again set down for argument and again argued by both parties, both by brief and oral arguments, and the judgment of both lower courts was affirmed, whereupon plaintiffs in error filed a motion for a rehearing, in which they attempted to set up for the first time a federal question, for the evident purpose of attempting to give this court jurisdiction, but by an examination of the several opinions rendered by the Supreme Court and the Court of Civil Appeals of Texas, it will be seen that neither of the courts ever passed on a federal question, nor was it necessary to do so, because not presented in the proper time, or in the proper manner, nor were they bound to pass upon a federal question, nor was it necessary or even proper for them to do so,

but even if they did, there was a non-federal issue made in the case in its inception, upon which the courts held the chattel mortgages invalid on a question of general law, as well as upon Art. 606 of the Statute of Texas, and the general policy o the laws of Texas, as is fully shown in the opinion rendered by Chief Justice Stayton, speaking for the court in answering the certified questions, hence the case was actually decided upon a non-federal question presented by the record, and whether there was or was not, presented a federal question in the time and in the manner provided by law, it certainly was not necessary to a decision of the case, whether it was or was not decided, can make no difference, and whether the Supreme Court of Texas decided the non-federal question right or wrong, it is a matter this court will not look into, hence has no jurisdiction in this cause. But we insist that there is nothing in the Texas Statute violative of any provision of the 14th amendment of the United States Constitution, the same being general, effecting all insolvent corporations alike.

There is another question which is decisive of the right of plaintiffs in error to take the case before this honorable court, which is, that after a final affirmance of the case by the Court of Civil Appeals, the case was then taken before the Supreme Court of the state

by plaintiffs in error, on its merits, upon the whole record, and that court decided it upon full argument, as if it had never been there upon a certified question, upon which presentation of the case counsel for plaintiffs in error appeared and argued it, in fact took the case there and had their day in the highest court of the state, so that it is difficult, if not impossible to conceive how they have been deprived of any constitutional right, or been deprived of any right whatever guaranteed to them by the 14th amendment of the United States Constitution, or any law, treaty or other provision of the Federal Constitution or Laws. If there had been previously error committed, or a deprivation of any right, it certainly was corrected at the instance of plaintiffs in error, and they given their day in court. If any error or mistake has been committed, it is harmless error, of which they cannot complain.

The record fails to show that when the case was presented to the Supreme court of the state on the certified questions, any objections were made to the right of the court to answer them; no affidavits or pleadings, or objections to the jurisdiction filed, nothing whatever done, unless it was by way of argument, but they were then content to speculate on their chances in the court on the certified question, but when defeat came, still speculate on taking the whole

case before the same court, and being defeated, inject what was supposed to be a federal question in the record on a motion for a *rehearing*, which being overruled build up a defense on that idea, and begin anew, during all which delay hold the money which is the subject of controversy. It seems to us there can be no doubt but the only effect which the writ of error to this court could possibly have is to delay the distribution of the money arising from the sale of the assets of the Lyons-Thomas Hardware Company.

So far as the questions of pleadings or any other issue is concerned, (except the constitutional issues attempted to be injected into the case, after all others had been disposed of,) the court will not be required to notice, and so far as any supposed federal question is sought to be presented, it is sufficient to say that none in fact material to the rights of plaintiffs in error has ever at any time been presented, but if presented, it was not presented in the proper time and in the proper manner and it was not necessary to decide it, and was not decided.

In support of our contention, and while we believe a mere suggestion that the writ of error was improvidently sued out in this case, and ought to be dismissed, we respectfully refer the court to the following authorities, which we think show an unbroken line

of authorities in support of our contention, which will necessitate a dismissal of the writ of error:

Murdock vs. City of Memphis, 20 Wall., page 590.
Davidson vs. New Orleans, 96 U. S., 104, 105.
United States States Statute, Secs. 999, 1003 to 1008.
Sayward vs. Denney, 158 U. S., 181.
Felix vs. Scharnweber, 125 U. S., 54.
Adams vs. Ry. Co., 112 U. S., 60.
Browne vs. Atwell, 92 U. S., 327.
Parmelee vs. Lawrence, 11 Wall. 36.
Railway vs. Rock, 4 Wall., 177.
Walston vs. Nevin, 128 U. S, 582 and 583
United States Statute, Sec. 709.
Santa Cruz, vs. Railway Co., 111 U. S., 441, 442.
Detroit City Ry. Co. vs. Suthard, 114 U. S., 133.
Boom Co vs. Boom Co., 110 U. S., 57.
De Sausure vs. Gaillard, 127 U. S, 233.
Crossley vs. New Orleans, 108 U. S., 105.
Klinger vs. Missouri, 13 Wall., 261.
Beatty vs. Benton, 135 U. S., 253 and 254.
Marrow vs. Brinkley, 129 U. S., 181.
Hale vs Akers, 132 U. S., 564 and 565.
San Francisco vs. Itsell, 133 U. S., 65.
Chouteau vs. Gibson, 111 U. S., 201.

Santa Cruz Ry. Co. vs. Ry. Co., 111 U. S., 362.

Estes vs. Trabue, 128 U. S., 229 and 230.

Texas & Pacific Ry. Co. vs. Southern Pacific Ry. Co., 137 U. S., 53.

Bushnell vs. Crook Mining Co., 148 U. S., 682.

New Orleans vs. Water Company, 142 U. S., 84.

New Orleans Waterworks vs. La. Sugar Co., 125 U. S., 29.

Miller vs. Texas, 153 U. S., 535.

Caldwell vs. Texas, 137 U. S , 692.

Leeper vs. Texas, 139 U. S., 467.

Eustis v Bolles 150 U.S. 366.

By an examination of the case of Butler vs. Gage, 138 U. S., 55, it will be seen that the question arose in a case that had been certified to a commission, and that in principle it is not different from this case so far as any objection is made to the case having been certified to the Supreme Court of Texas, on certain issues.

And by an examination of the case of Campbell, receiver, vs. Tax Collector, reported in the 85th Vol. of Texas Reps., it will be seen that the Supreme Court of Texas, in construing the Texas Statute in reference to certified questions from the Courts of Civil Appeals, it is held that the fact that the latter court, of its own motion, certified any one or more

questions in a case to the Supreme Court for its decision does not deprive either party from taking the case up to the Supreme Court by writ of error after the final decision of the Court of Civil Appeals, made in accordance with the opinion of the Supreme Court. That is precisely what happened in this case, and still plaintiffs in error are neither happy or contented.

The opinion of the Supreme Court of Texas, rendered in response to the certified questions, will be found in 86th Texas Reps. p. 143, and the opinion of the court on the hearing of the whole case, rendered by Mr. Justice Brown, is reported in Vol. Texas Reps. p.

We will notice the assignments of error in this court in the order in which they appear:

The first assignment of error complains because the court held that the same rights, in every particular, were not given to private trading corporations that individuals have, to dispose of their property, prefer creditors, etc., whether solvent or insolvent, and this, after the corporation had not only become insolvent, but had ceased to do business as such, with no intention, nor the ability to continue to carry out the objects of its creation.

This question, like the others presented by the assignment, we think was not presented in the proper

time, or in the proper manner, but if it was, we submit that their proposition is not sound in law, nor is it true that in the sense or for the purpose presented in the issues in this case, is a corporation a person, within the meaning of our Texas Statute, but of course, are so, for the purposes of holding them liable for their contracts and for many other purposes, such as protecting them in their property rights. (See Mining Co. vs. Pennsylvania, 125 U. S., 186 and 187). But we presume it would not be seriously contended that a corporation would be considered "a person" in case of the violation of a marriage contract, would have the right to hold a public office, or that it could administer upon a deceased person's estate, or make a will disposing of its property in that way, or become surety on an official bond, etc. All its powers are defined by the State Statute.

This question is one which the general principles of law, as well as the Statute of Texas, fully determines, and there is therefore no question decided necessarily, involving a right under the 14th amendment to the Constitution of the United States, or any other provision of the United States Constitution, or laws passed in pursuance thereof. It will be noticed that the Lyons-Thomas Hardware Company ceased to do business, with no intention to continue, or resume, at the

moment it executed the chattel mortgages, and by them, it was rendered wholly unable to do so, and that their execution and delivery, so far as creditors were concerned, terminated its existence, and worked a practical dissolution as effectually as to creditors as would a dissolution by decree of a court of competent jurisdiction have dissolved it, and the making the chattel mortgages, turning over its entire assets, real, personal and mixed, according to Art. 606 of the Civil Statutes of Texas, made the managers thereof trustees for creditors and they were forbidden to dispose of its assets in any other way than equitably for the benefit of its creditors, ratably. It then ceased to be "a going concern;" it then and there made its last will, so to speak, and from thence forward ceased to exist in its artificial person, as to creditors, and was forbidden by the general principles of law, as well as by Statute, to make an unjust and inequitable disposition of its assets, which became a trust fund for the benefit of its creditors.

Under the Texas Statute, it might buy or sell property as it saw proper for the *purpose of carrying on the business for which it was created*, but making a chattel mortgage after practical dissolution, was not any part of the business for which it was created, but its then condition was, by Statute, grounds for appoint-

ing a receiver of its assets, besides the whole policy of our Texas law, proceeds upon the idea that in such condition of things, the assets became a trust fund, and the managers, trustees for the creditors, instead of being clothed with the same authority and dominion over them that an individual has in such case.

This whole question is so ably discussed by the Supreme Court of Texas, in the opinion delivered by Chief Justice Stayton, rendered in this case, that we will pursue the argument on this proposition no further, but respectfully ask the court to read it. It will be found in case of Lyons-Thomas Hardware Company vs. Perry Stove Manufacturing Co., 86 Vol. Texas Reps., pp. 149 to 166, inclusive, and authorities there cited, and in addition to the authorities there cited, will add:

Panhandle Nat. Bank vs. Emery, 78 Tex., 498.

Thompson on Liability of Stockholders, Sec. 267, lays down the rule, that in such case the corporation is practically dissolved.

In case of McDonald vs Alabama Ins. Co., reported in 26th American and Eng. Corp. Cases, p. 261, this language is used by the Supreme Court of Alabama: "That the defendant corporation was dissolved, within the meaning of the Statute, by the assignment made for the benefit of creditors, in Oct.,

1886, and by its entire cessation of business there can be no doubt. A practical and not a judicially adjudged dissolution is what the Statute contemplates."

This corporation had no rights, no existence, no power, except what were given to it by its con-stating instrument, or act of incorporation and nowhere can the power be found, given by our Statute to a private corporation to dispose of, or pledge its property to secure part of its creditors to the exclusion of the rest, by chattel mortgage or otherwise after it is dissolved by the expiration of the time for which it was incorporated, or after it had been dissolved by decree of a Court of competent jurisdiction; nor as was said by Chief Justice Stayton, after it had surrendered all its assets of every kind, ceased to do business, with no intention of continuing it longer, being no longer either able or willing to carry out the objects of its creation, for then as to its creditors, it was at once practically dissolved, and its assets became a trust fund, and the only fund to which creditors could look for the payment of their debts, and to hold that such a condition of things, though not technically a dissolution, would not constitute its assets a trust fund for the payment of its debts, ratably, would be to deny every principle of the law that governs in case of a technical dissolution, for in every such case the assets

at once become a trust fund in equity for the payment first, of the debts of the concern; second, a distribution of the remaining assets, if any, among its members and stockholders.

It must be admitted that corporations have such powers only as are granted them by their charter, in express terms; or by fair and reasonable implication, but we submit, that transferring all its assets to a trustee, directing him to sell every species of property owned by the corporation, which is entirely inadequate to pay its debts, and directing him to pay the proceeds to part only of its creditors, leaving perhaps the creditors who furnished the assets, wholly unpaid, would not be a transaction necessary or proper to the promotion, or carrying on its business, and hence such a transaction as would be entirely outside the power or authority given to corporations by Statute.

But it is quite different with a natural person, for he can do as he pleases with his own property, and may prefer any whom he pleases, so it is not fraudulently done, is done bona fide and in good faith, and in such case creditors may follow him with executions, while they cannot follow the stockholders of a corporation with executions after all the stock has been paid in, and all the corporate assets exhausted, though its members may be rich, as individuals. Hence our

Texas Statute, as well as the common law, forbids such inequality, after not only insolvency, but dissolution, and actual and intended cessation of business occurs. The facts of total insolvency, and a determined cessation of business, with no effort, ability or desire to continue it, were found by *the trial court, and sustained by both Appellate Courts*, as being amply shown by the evidence, and we presume it will not be seriously contended in this court that it has the right to, or will revise or even look into the facts, for it has not the jurisdiction to do so. We have never doubted that a corporation, although in fact insolvent, might pledge its property, or prefer its creditors, while it was a going concern; or hoped to bridge over and continue, and the security given was with a view to enable it to do so, but we insist, that when, as in this case, it is practically dissolved as well as insolvent, then such a power is denied it, both by the common law and by the Statute of Texas, and that creditors are then entitled to the just principle that "equality is equity," for to allow to be done what was attempted here, would be to evade every principle of law, both common law and Statute, on the subject, simply by saying, we were, at the time the chattel mortgage was made, in possession of our corporate assets, although the very act which gave the preferences closed for-

ever our corporate existence, and was done for that purpose, such an idea, is following a supposed technicality, instead of the spirit and meaning of the law. The chattel mortgages in this case were not given for the purpose of, or with a view to carrying on their corporate business, but for the very reverse of that, with a view to immediate death and permanent dissolution, hence the authority conferred by Statute, upon which plaintiffs in error seem to rely, to the effect that a corporation may mortgage or pledge its property to secure the payment of its debts, when taken together with the whole scope of the Statute, the objects intended, the power actually conferred, the purposes for which it may contract debts, purchase and hold property, the status its officers, directors or managers occupy after dissolution, when insolvent or not, and especially when, as in this case, it is wholly and hopelessly insolvent, it seems clear that they are not empowered to commit the inequitable act attempted in this case, and that the Supreme Court of Texas was eminently correct when, on two several occasions, it so decided, and in doing so, gave reasons why it could not do it, which seem unanswerable.

We submit the above as an answer to the first and second assignments of error filed by plaintiffs in error.

The third assignment of error is based upon a supposed conflict between the 14th amendment to the United States Constitution, and the act of the legislature of Texas of 1893, authorizing the several courts of Civil Appeals to certify questions of law on its own motion, to the Supreme Court to be answered. We have hereinbefore answered that assignment, and attempted to show that such Statute was not, could not be in conflict with the 14th amendment aforesaid, but was just such a regulation, as the legislature had a right to make in reference to the mode and manner of conducting procedure in the courts of this State, and that it did not deprive any one of any right, or of property without due process of law, for *it was itself, due process of law in the State of Texas*, which gave to each litigant a full hearing in the highest Court of the State, and was general, applying alike to all litigants, because, as we have shown, any litigant has the right, and may take a case up to the Supreme Court, after it has been decided by the Court of Civil Appeals, though one or more of the questions involved in the case may have been decided by it under the directions of the Supreme Court, in response to questions certified to it, and we have shown, and the record will show that these same plaintiffs in error did invoke the decision of the Supreme Court on the whole case, after it had been passed upon

by the Court of Civil Appeals, so that no right, privilege or immunity has been in fact denied them, nor have they been denied any right, or deprived of property without all the "process of law" known to our jurisprudence, and the only thing that we are able to see, that could be contended for by plaintiffs in error, is, that though we have been fully heard before the Supreme Court of the State; once on a certified question, and again on the whole case, with the entire record before the court, at both of which hearings we were present, and argued the case orally and by briefs, yet having lost both times, would like to have another trial. We believe the court will not give ear to such tampering with the judicial proceedings of the country. The act of the Legislature of 1893, authorizing questions to be certified to Supreme Court to be answered by it, is as follows:

"Whenever in any case pending before the Court of Civil Appeals, there should arise an issue of law which said court should deem it advisable to present to the Supreme Court for adjudication, it shall be the duty of the presiding Judge of said court to certify the very question to be decided, to the Supreme Court, and during the pendency of the decision by the Supreme Court, the cause in which the issue is raised shall be retained for final adjudication in accordance with the

decision of the Supreme Court upon the issue submitted."

The fourth assignment of errors, complains because, the trial court rendered judgment against the Farmers' and Merchants' Bank, and the Paris Exchange Bank, without, (as is contended) sufficient pleadings having been filed in the case to authorize judgments against them.

We deem it sufficient to say, in answer to this assignment of errors, that it seems strange that such an assignment was made, for that is a matter purely for the Courts of Texas to determine, and that it was determined by the District (State) Court, by the Court of Civil Appeals, and twice by the Supreme Court, adversely to the contention of the plaintiffs in error, and we suppose that matter is at rest. We cannot see how it is possible to twist this matter of State Statute, and State practice into conflict with the 14th amendment of the Consitution of the United States, and can account for its having been done, because that issue is the only one relied on to reverse the judgment that was raised in the trial court, in the proper time and proper manner, and we believe plaintiffs in error have nothing whatever to stand on in this contention. If there is, then all the former decisions of this Honorable Court must be held for nought, and the whole case on its

merits, both of law and fact, be entered into by this court, which certainly would be a task, it would reluctantly undertake, for if such were the rule, the various courts of the States would be of little value, and jurisdiction of every imaginable case, every issue, of law or fact, every ruling made by either of the lower courts, would be thrust on the Supreme Court of the United States, which would be most intolerable.

In reference to what is meant by "due process of law," and whether in this case plaintiffs in error have been deprived of that right, we refer to the case of Davidson vs. New Orleans, 96 U. S., page 105, and authorities there cited, in which Mr. Justice Miller, speaking for the court, uses this language: "It is not "possible to hold that a party has, without due process "of law, been deprived of his property, when, as regards "the issues affecting it, he has, *by the laws of the* "*State*, a fair trial in a court of justice, according to "the modes of proceeding applicable to such a case." Undeniably this right and privilege have been extended to the fullest extent to plaintiffs in error.

In the case of Duncan vs. Missouri, 152 U. S., Reps., 382, Chief Justice Fuller says, in defining, "due process of law," that due process of law and the equal protection of the laws are secured if the laws operate on all alike," and in the same case it is shown that the

legislature has a right at any time to change the mode of procedure, and the courts authorized to try cases, without violating any right of the parties to a suit, or rendering the proceeding obnoxious to the 14th amendment to the U. S. Constitution, nor is it retroactive, but leaves the party with not only a substantial remedy, and with their full rights, of which they availed themselves in this case.

We deem authorities on this proposition wholly unnecessary, but will cite the cases of Treasurer vs. Wygall, 46 Texas 447; Parker vs. Buckner, 67 Texas Reps., 23.

There is nothing in the Constitution of Texas, or that of the United States, which prohibits the Legislature of Texas from establishing, or changing the mode and manner of trying causes, or providing how they may be brought before the proper court, and what court has the right to hear and determine any question brought before it, hence certifying a question to the highest court of the State to be by it answered, is not repugnant to the Constitution of the United States, nor does it deprive any party of any right guaranteed to him, so that it acts on all of the same class in the same way. On this point we respectfully refer the court to what is said in Giozza vs. Tiernan, 148 U. S., 661 and 662.

The Legislature of Texas complained of is not special, but general, and treats all persons and corporations of the same class, and under the same conditions, alike, and hence not violative of the said 14th Amendment. On this point we respectfully refer the Court to what is said in *re* Missouri Pacific Ry Co. vs. Mackey 127 U. S. Reps 209 and 210.

In the case of Munn vs. Illinois, 94 U. S. 134, Chief Justice Waite in delivering the opinion of the the Court said, "A person has no property, no vested interest in any rule of the common law." And for the same reason, we submit that he has no such interest in any rule, or mode of procedure established by a statute of a state, regulating the manner of procedure in the Courts, in trying or hearing causes, but the legislature may change or altogether abolish any particular manner of bringing parties or causes of action before the Court, so that the right, and an opportunity to be heard, remains. In such case, no right guaranteed by the constitution is violated, nor does such legislation come in conflict therewith, when such changed or new form of procedure is general and governs all litigants under the same conditions alike. It becomes itself "due process of law," and gives to every trading corporation situated as this was; or one that had been dissolved, and was totally bankrupt, and had ceased to

exist the same right to appear before the constituted authorities, and make its defense, or prosecute its cause of action before such court, as is given to any individual, or corporation.

We cite a very able and exhaustive opinion on the subject of "due process of law" delivered by Judge Emery which will be found in the case, Eames vs. Savage, reported in 77th, Maine, Reps., p., 212. Also, the case of Village of Middleton, 82, New York, Reps., 201.

In the case of Murray vs. Hoboken Land and Improvement Co., 18, How. 281, among other things Mr. Justice Curtis, says that: "Due process of law" generally implies and includes *actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings,*" and surely plaintiffs in error have enjoyed this right, and at their own instance and request, and hence have no ground of complaint now. See Brown vs. Smart, 145 U. S, 458-9.

While we do not understand, that the application for a writ of error, constitutes any part of the record in the case, it may be looked to for some purposes, and in as much as said application appears to be constituted mainly of an argument, we cannot concur in many of the partial statements and some of the conclusions

reached by plaintiffs in error as presented in said application, and therefore beg the indulgence of the court, while we very briefly call attention to the record, and all the record, touching controverted points, in order that the court may not missapprehend, what it in facts shows, when taken together in connection with any given question.

It is said that when the trial court (or rather Judge at chambers) held the chattel mortgages valid, the defendants in error did nothing in opposition to it, but acquiesced therein, until long afterwards. The record, as well as the opinion of Justice Rainey of the Court of Civil Appeals shows, that a bill of exceptions was taken and filed at the time the Judge at chambers ruled that the chattel mortgage was valid, and after the case went up to the court in term time, both parties amended their pleading from time to time, until final trial on the merits, before the District Court, where the ruling at chambers was reversed.

The opinion of the Court of Civil Appeals, as well as of the Supreme Court (the latter delivered by Mr. Justice Brown) show that the trial Judge at chambers was without jurisdiction to render any such decree as he attempted to render, and that all his acts in the matter were void, (see opinions). Besides, these were all matters of practice governed by the laws of the

State, and rulings thereon by the State Courts, are conclusive, and cannot be inquired into by this court.

It will appear from the record, that although the petition called for judgment against Harrison for devastavit, it was abandoned, and only that actual amount of sales less all costs was asked for and recovered. Complaint is made in said application, because judgment was rendered against the two banks for money received by them respectively, without any pleadings to base it upon, and without evidence that they had received from Harrison any of the proceeds of the Lyons-Thomas assets. The record will show that all the State Courts before which this case has been heard, held the pleadings sufficient, and that the Farmers' and Merchants' Bank, at the inception of this case, came in voluntarily, made itself a party, fought the creditor's bill, and tried to sustain the mortgages, and hold its preferences thereunder; that the Paris Exchange Bank was made a party by plaintiffs in the bill; that it too, fought to sustain the mortgages, with its preferences.

The report of Harrison, the trustee made to the court, of his acts as trustee, shows that he paid over to the two banks, the amounts of money arising from the sale of the Lyons-Thomas assets, for which judgment was rendered against them respectively, and the record also shows by the evidence of T. J. Record, that

he did pay the money over to the Paris Exchange Bank, and the record shows that it was admitted, and proved that the money for which judgment was rendered against the Farmers' and Merchant's Bank, was paid over to it, and not denied, but in its answer, the bank admitted it. All these matters have been passed upon and we think settled by the State Courts, and we respectfully ask the court in the event it desires to look into them, to examine the record and determine whether the record does or does not show the facts as we claim them.

In said application for a writ of error to the Supreme Court of Texas, it is said, that on the 9th day of November 1889, the Lyons-Thomas Hardware Co., executed a chattel mortgage, and afterwards executed two deeds of trust, when in fact, the record shows that all these instruments were executed and delivered to Harrison, trustee, on the same day, one after the other as fast as they could be written, and that attorneys were employed at the time to draw all of them, and that when the first was executed, it was intended to execute the others, as fast as could be written, and further that the indebtedness of the Hardware Company, at the time, was largely in excess of its entire assets. All these facts were found by the trial court and concurred in by both appellate courts. (See the record.)

The record also shows, that the Hardware Corporation, never attempted to and did not longer even try to continue business, nor had it the ability so to do, which facts were also found by the court.

The judgment of the trial court, which was reformed and affirmed, shows that when the money which had gone into the banks, should be collected from them, the amounts collected should go as a credit on the judgment against Harrison, so that only the true amount should be collected in the aggregate from all persons against whom judgment was rendered.

The record shows, and the courts found as a fact, that at the time the chattel mortgages were executed, the Lyons-Thomas Hardware Company did not intend or expect to longer continue business, but were knowingly then and there going out of existence, and had not the slightest idea of continuing business as such.

It will appear from an examination of the opinion delivered by Chief Justice Stayton, speaking for the Supreme Court of Texas, when passing upon the certified question, that independently of any other question or principle of law, the chattel mortgages in this case must be held void, for want of power to execute them, and that when executed, the circumstances were such, as not only to render the corporation wholly insolvent, but a dissolved corporation, and that in such

case, by virtue of Art. 606, Revised Civil Statutes of Texas, its assets constituted a trust fund for its creditors, and if a trust fund, must be distributed according to the principles of equity-ratably. If this be true, the question at issue must stand as decided by the highest court of Texas, independent of any other question, federal, or common law. Such has been held to be the law by the Supreme Court of the United States in an unbroken line of decisions for many years, and it has also often been held by said court, that the construction placed upon the Statute of a State, by the highest court of that State, is binding on the Supreme Court of the United States, and that the case could or might be decided on such statute, and is decided by the Supreme Court of the State, then although a federal question may have been properly raised, and decided wrong by the State Court, still there being a statute, or other non-federal question in the case upon which it might be decided, the decision of the Supreme Court of the State must be affirmed.

Art. 606, Civil Statutes of Texas, reads as follows:

"Upon the dissolution of any corporation already created by or under the laws of this State, unless a receiver is appointed by some court of competent authority, the president and directors or managers of the affairs of the corporation at the time of its dissolu-

tion by whatever name they may be known in law, shall be trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution as far as such money and property will enable them; and for this purpose they may maintain or defend any judicial proceedings."

That statute has been construed by the Supreme Court to mean that when a corporation created by the laws of Texas, has not only become insolvent, but ceases to be a "going concern," and does not intend to continue to carry out the objects of its creation, and cannot do so, it becomes a dissolved corporation, and its remaining assets are at once a trust fund, liable to to be used only in the payment of its debts, ratably. (See the opinion reported in 86 Texas Rep., p. 149.)

And the same verity is given to the rulings of the State court upon all questions of pleadings, practice, evidence, and the manner of conducting procedure for the trial of cause in such courts.

We respectfully ask that the writ of error granted.

in this case be dismisssed.

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O. P. HALE,
T. S. HILL,
H. D. MCDONALD,
A. P. PARK, and
R. L. ROSS.

Attorneys for Perry Stove Manufacturing Company, and all the other defendants in error.

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16,007.

IN THE
Supreme Court of the United States,

October Term, 1895.

No. 717.

THE LYONS-THOMAS HARDWARE CO., THE FARMERS & MERCHANTS BANK, THE PARIS EXCHANGE BANK, ET AL.,

Plaintiffs in Error,

versus

THE PERRY STOVE MANUFACTURING CO., SCHOVERLING, DAILY & GALES, MERCHANT & CO., ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

Argument of JAMES G. DUDLEY,

Counsel for Plaintiffs in Error.
Contra the Motion to Dismiss or Affirm.

16,007.

Supreme Court of the United States,

October Term, 1895.

THE LYONS-THOMAS HARDWARE CO., THE FARMERS & MERCHANTS BANK, THE PARIS EXCHANGE BANK, ET AL.,

Plaintiffs in Error,

No 717 *versus*

PERRY STOVE MANUFACTURING CO., SHOVERLING, DAILY & GALES, MERCHANT & CO., ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

Statement of the Case:

This suit was originally brought in the district court of Lamar county, Texas, November 20, 1889, by the Perry Stove Manufacturing Company, and six other simple contract creditors of the Lyons-Thomas Hardware Company, in what they termed a "creditor's bill," setting up that the said hardware company was an insolvent private corporation, and had, on November 9, 1889, executed to L. P. Harrison, trustee, three mortgages to secure certain debts, covering all of its prop-

erty and giving preferences; that the Baker Wire Co. had sequestered a part of the assets, making only the hardware company, the trustee and the Baker Wire Co. parties, and praying for an injunction; that a receiver be appointed; that the mortgages be set aside and the fund distributed as a trust fund among the creditors without preferences.

A temporary injunction was granted by the district judge at chambers, November 20, 1889, and notices ordered to be issued for all of said parties to appear before him at Clarksville, Texas, on November 29, 1889, to answer said petition and show cause, if any, why a receiver should not be appointed as prayed for.

Upon the hearing, November 29, 1889, all the defendants answered under oath, and the creditors secured under the first mortgage made themselves parties, and with the trustee, set up the mortgages, and prayed that he be allowed to administer the trusts and to execute the same under the direction of the court.

The case was fully heard before the court upon questions growing out of the application for injunction and receiver, and the court rendered its judgment dissolving the injunction, declaring the mortgages to be valid and the security good, refusing the plaintiffs' application for a receiver, and granting the application of the defendants and intervenors, that the trustee, L. P. Harrison, be allowed to administer the trusts under the order and direction of the court, ordering that he execute bond in the sum of $85,000—conditioned that he would faithfully execute the trusts and pay over to the secured creditors the money, as in the mortgages directed, appointing appraisers to inventory and appraise all of the said property, and directing that the trustee make his report at the next regular term of the district court, and directing the clerk to enroll the decree upon the

minutes of the court, which order was duly excepted to at the time. This decree was duly signed by the judge and enrolled by the clerk, and at the following term the minutes of the court were signed by the judge. The trustee gave bond for $85,000 as required. The inventory was duly filed and approved and the trustee administered the trusts under the directions and orders of the court made in vacation, sold the property and paid the proceeds upon the mortgage debts as ordered, and at the following term filed his accounts showing how he had executed the same, and asked to be discharged.

The plaintiffs took no further action in the case and made no effort to have the decree of the court set aside, but acquiesced therein until all of the property had been sold and the proceeds applied to the payment of the secured debts under the order of the court, when on August 7, 1890, the plaintiffs and a number of other creditors filed a "first amended original petition," setting up that Shoverling, Daily & Gales, and eighteen other creditors of the Lyons-Thomas Hardware Co., had obtained judgment against it; that the mortgages were invalid and the trustee had refused to pay any except the secured debts; that the members of the hardware company owed large amounts of unpaid stock; that the court had rendered its decree and directed that the trust be executed by the trustee, L. P. Harrison, under the direction of the court, and that he give bond for $85,000, which he did give; that he had wasted the funds, and praying judgment against him on the bond; that the funds be divided, etc.

On March 30, 1891, the plaintiffs filed a second amended original petition in which they sought judgment setting aside the mortgages and against the trustee for conversion, waste and devastavit, and also against the stock-holders of the corporation

for unpaid stock, and ask judgment against the two banks and L. P. Harrison. The answers and pleas of intervention set up the mortgages and their validity and the execution thereof by the trustee under the orders of the court.

The case was tried before the court, and on April 9, 1891, the court overruled the demurrers and exceptions of the defendants and intervenors to plaintiffs' petition, and sustained the plaintiffs' demurrer and exceptions to the answers of defendants and pleas of intervention by intervenors, to which they excepted, and rendered judgment in favor of the plaintiffs against the trustee for the proceeds of the sale of the property, less his costs, expenses and commission for selling. Also a judgment in favor of plaintiffs against the Farmers' and Merchants' bank for $48,193.70, the amount of said money paid to it by said trustee on its debt; also a judgment against the Paris Exchange bank for $7,508.10, the amount of said money paid to it by said trustee on its debt, decreeing that the mortgages were void; that the fund be paid into court, dismissing the Baker Wire Co. from the case, etc. Defendants and intervenors in open court excepted and gave notice of appeal, filed their statement of facts, appeal bonds and assignments of error, and took the case to the Supreme Court of Texas by appeal, filing the transcript in said Supreme Court on the — day of May, 1892. (See opinion of Court of Civil Appeals by Mr. Justice Rainey, a copy of which is in the record, for foregoing statement of the case).

The law putting in operation the Courts of Civil Appeals for the first, second and third supreme judicial districts of Texas, and providing for the transfer of causes to said courts from the Supreme Court of Texas, went into effect Sept. 1st, 1892, and thereafter this cause was transferred from the Su-

preme Court of Texas to the Court of Civil Appeals, second district.

When this case was pending in the Court of Civil Appeals of the second supreme judicial district, that court certified to the Supreme Court for answer the following questions:

1st. "Whether or not a preferential deed of trust, executed by a private trading corporation, (chartered in July, 1884, under general laws) after it has become insolvent and consequently ceased to carry on its business, without any intention of resuming the enterprise, is void as against the unsecured creditors of such corporation?"

2d. "If a private corporation, under such circumstances, has the same power to prefer its creditors as an individual, whether such preferential deed is void in law because of the fact that the stock-holders, directors and other officers of the corporation who execute it in the name of the corporation are liable as sureties and endorsers on the preferred claims?"

"Both questions (says Stayton, Chief Justice of the Supreme Court of Texas,) present a case in which, on account of insolvency, the corporation had ceased to carry on business, and had no intention at any time to resume when the instrument was executed, through which preference was intended to be given. The corporation was one having no powers other than such as are given by the laws of the state regulating incorporations under the general laws, which of course, will embrace powers, although not expressly given, that are necessary to the exercise of those which are."

"It is contended, however, that such corporations have all the powers to give preferences which a *person* has, so long as the corporate existence continues, unless such power is denied by the common law or by the statute of this state." (See

statement of the case in the opinion of Chief Justice Stayton, as published in 86 Texas Report, on page 149, a copy of which is in the record.

The Supreme Court of Texas, in an opinion rendered by Chief Justice Stayton in answer to the questions certified, after discussing the powers of a corporation under the different provisions of the statutes of Texas, held that the Lyons-Thomas Hardware Co., a corporation, did not have the same right or power to prefer its creditors that a person or individual had, under the laws of Texas; that the provisions of the statutes of Texas authorizing corporations to transfer, mortgage, or pledge its property, applied only to solvent corporations continuing in business, and not to insolvent corporations ceasing to do business, and that the insolvency of the corporation, followed by a cessation of business, with no intent to resume, should be held to have the full effect of a dissolution under the statute, and *ipso facto* converted all of its property into a trust fund, and its officers and directors into trustees for its creditors, and gave to the creditors of the corporation the same rights which the statute gave them under a technical dissolution, and answered the questions that the corporation had no power to execute the preferential deed of trust or mortgage, and that the attempted preference was invalid as to the other creditors of such corporation. (See opinion of Chief Justice Stayton, 86 Tex., 143 to 166, a copy of which is in the record).

The case was then transferred from the Court of Civil Appeals, second district, to the Court of Civil Appeals, fifth district, and was decided by that court January 31, 1894, Associate Justice Rainey delivering the opinion. After stating the case, which we have heretofore copied, he thus states these questions raised as follows:

"The first and fourteen assignments of error are treated together by appellants. Under these assignments two propositions are made, as follows: 1st. A private business corporation when not restrained by statute, has the same power to execute a mortgage as an individual, and if insolvent, may, in good faith, execute a valid mortgage with preferences. 2d. A private corporation in this state is authorized by statute to execute a mortgage, and there being no exception in the statute, the courts cannot legally engraft one; but corporations have the same rights as individuals to execute mortgages preferring creditors." And after quoting the question certified, and speaking of the opinion of the Supreme Court of Texas, given by Chief Justice Stayton, quotes the following as the answer of the Supreme Court to said question:

"The condition of the corporation set forth in the question propounded, under the long recognized rules of equity, conferred upon every unsecured creditor of the corporation a right to a ratable share of the proceeds of all the assets of the corporation not subject to priorities lawfully existing when this condition arose, and we therefore answer that neither the stock-holders nor directors of the insolvent corporation had lawful power under the facts stated to make a preferential deed of trust, whereby any creditor, whether a stock-holder, director or other officer of the corporation or not, could acquire a preference, and that the attempted preference would be invalid as to other creditors of the corporation." And then makes the following disposition of them: "This settles the proposition raised by said assignments against the appellants, and we must hold that said assignments are not well taken. This ruling applies to the fifth assignment of error, which raises practically the same issue." And after passing upon other questions raised, reformed and

affirmed the judgment of the district court of Lamar county, Texas, in the following words:

"The judgment of the court below is correct in holding the conveyances made by said hardware company to said Harrison void, and in rendering judgment against said Harrison for the amount of the assets that went into his hands, and against the banks for the amounts received by them respectively, and that said amounts be paid into court for distribution, and to that extent the judgment is affirmed. All the creditors of said hardware company were entitled to participate in the distribution of the funds of said hardware company, and the court below should have rendered judgment for all creditors who desired to share in the distribution. In failing to do so there was error. The judgment will be here reformed as indicated, and the judgment affirmed." RAINEY, Associate Justice.

(A copy of the opinion of Justice Rainey is in the record).

The plaintiffs in error herein then sued out a writ of error from the Supreme Court of Texas to the Court of Civil Appeals, fifth district. In their petition for such writ of error, plaintiffs in error, among other things, complained of the judgment and decision of said Court of Civil Appeals in denying to the Lyons-Thomas Hardware Co. and those claiming under it, the equal protection of the laws of Texas, to-wit: the same right which any individual or corporation has, under the laws of Texas, to dispose of its property by way of mortgage to secure its debts. And also raised the question as to the validity of the law of Texas under which the questions in this case were certified by the Court of Civil Appeals to the Supreme Court of Texas, claiming that said law was unconstitutional and the proceedings of the courts of Texas thereunder were without due process of law. (See record page).

On the questions thus presented, the Supreme Court of Texas, in an opinion by Associate Justice Brown, simply refers to its former opinion on the certified question in the following language:

"In this case, upon a question certified by the Court of Civil Appeals, this court held that an insolvent corporation, which had ceased to do business, or which, by the making of an instrument conveying all its property, incapacitates itself for continuing its business, cannot make a mortgage or deed of trust by which it gives a preference to some of its creditors over others. (Lyons-Thomas Hardware Co. vs. Perry Stove Manufacturing Co., 24 S. W. Rep., 16). We see no reason to change our opinion on that question." (See copy of opinion in the record). And after passing upon other questions raised, affirmed the judgment of Court of Civil Appeals as reformed. Opinion delivered June 7th, 1894.

Plaintiffs in error filed a motion for a rehearing in the Supreme Court of Texas, again raising the questions and the validity of the judgments against the Farmers' and Merchants' and Paris Exchange banks, which was overruled by said court on the 6th of June, 1895. And on the 29th of July, 1895, plaintiffs in error sued out a writ of error from this court to the said Supreme Court of Texas, which was allowed by Hon. R. R. Gaines, Chief Justice of the Supreme Court of Texas, on the said 29th day of July, 1895.

The assignment or specification of errors, filed in the Supreme Court of Texas and presented with the petition for writ of error to the Chief Justice of said Supreme Court, are as follows:

I.

"The Supreme Court of the State of Texas erred in deny-

ing the Lyons-Thomas Hardware Company, one of the plaintiffs in error, the same right, privilege, and immunity specially claimed and set up of disposing of its property, either absolutely or as security for the payment of its debts, which an individual or any private corporation, solvent or insolvent, has under the law and statute of the State of Texas, and in holding and deciding the mortgage and deeds of trust executed by the Lyons-Thomas Hardware Company to L. P. Harrison, trustee, on the 9th day of November, 1889, to secure certain creditors therein named to be invalid because of the attempted preference, for the reason that under the statutes, laws, and the decisions of the State of Texas an individual, though insolvent and ceasing to do business, has the right to prefer by mortgage or deed of trust one or more of his creditors to the exclusion of others as at common law, and the denial by the Supreme Court of Texas of the same right to the Lyons-Thomas Hardware Company, a private corporation, incorporated under the laws of Texas, is in violation of the 14th amendment of the Constitution of the United States, which provides, among other things, that 'no state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'"

II.

"The said Supreme Court of the state of Texas erred in denying the said plaintiff in error, the Lyons-Thomas Hardware Company, and those claimed under it the right, privilege, and immunity expressly given to all corporations under the statutes of Texas of executing a mortgage or pledge of its property to

secure the payment of its debts, and in deciding that said statute of Texas applied only to solvent corporations who were continuing the business for which they were organized, for the reason that the statutes of Texas, R. S., Arts. 575, 577, expressly authorize all corporations created under the laws of Texas to mortgage or pledge their property to secure their debts without qualification or exception, and the said Lyons-Thomas Hardware Company, though insolvent, had the same right, privilege, and immunity, and entitled to the same protection under the statutes of Texas in the disposition of its property to secure the payment of its debts that is given to any corporation under such laws of Texas, and the denial of such equal right by the Supreme Court of the state of Texas is contrary to and in violation of the 14th amendment to the Constitution of the United States."

III.

"The said Supreme Court of the state of Texas erred in its decision in favor of the validity of the act of the legislature of the state of Texas entitled "Courts of Civil Appeals, regulating the certifying of questions at issue to the Supreme Court for adjudication, approved May 2d, 1893;" and erred in determining the rights of plaintiffs in error upon the certified questions in pursuance of said act, because said act of the legislature of the state of Texas was passed after plaintiffs in error had perfected their appeal to the Supreme Court of Texas; and they were entitled to a hearing and decision of their case upon the whole record before a tribunal authorized by the constitution and laws of Texas to pass on the same according to the rules and principles which had been established in the system of jurisprudence of Texas for the protection and enforcement of private rights.

The questions certified are abstract propositions of law, not supported by the evidence in the case, in this: the evidence shows that at the time the Lyons-Thomas Hardware Company executed the chattel mortgage to secure the other plaintiffs in error it was still a going concern; that it was not hopelessly insolvent; it did not then contemplate ceasing to do business; its officers, managers, and directors believed it would be able to arrange its matters and go ahead; no part of the record or the fact contained in the record were sent up or made part of the certified questions. The said act of 1893 does not give the parties to the suit any right to be heard, either upon the certified questions or upon what shall be contained in the certified questions, or to controvert or correct the certified questions, and the law makes no provisions for the record or any part of it accompanying the certified questions, and provides that the decision of the Supreme Court on its certified questions is final and binding on the Court of Civil Appeals, thereby determining and taking away the property rights of plaintiffs in error without due process of law, in violation of the 14th amendment of the Constitution of the United States."

IV.

The said Supreme Court of the state of Texas erred in sustaining the judgment against the Farmers' & Merchants' bank and the judgment against the Paris Exchange bank as rendered by the district court of Lamar county, Texas, and as reformed and affirmed by the Court of Civil Appeals for the fifth supreme judicial district of Texas, because under the pleadings no judgment whatever for money could be rendered againts either of said banks. There was no allegation in the pleadings that either of said banks had ever received any money or property of the

Lyons-Thomas Hardware Company, or that either of said banks were then or ever had been in possession of any of the property or assets of the Lyons-Thomas Hardware Company, and no evidence was admissible to prove the payments to said banks by Harrison. The money which the said banks had received on their respective debts, under the chattel mortgage, could not be taken from them or either of them except by due course or process of law—that is to say, by a suit instituted and conducted in accordance with the prescribed course of procedure for determining the title to property. The money judgments against said banks respectively, is without due process of law and violates the 14th amendment of the Constitution of the United States."

"Wherefore plaintiffs in error, by their said counsel, pray that the said judgment of the Supreme Court of the state of Texas be reversed, annulled, and held for naught." (Extract from record, pages 73-78).

The defendants in error have filed a motion to dismiss or affirm upon the following grounds:

"1st. There is no Federal question shown in the record.

2d. The record shows that the case was decided upon a non-Federal question on the general principles of law, and especially on the statute of the state of Texas, no Federal question was presented, but if presented, it was not in the time or in the manner required by law. No Federal question was decided which was necessary to the decision of the case; or that would give this court jurisdiction.

3d. Because due process of law has not been denied plaintiffs in error, as shown by the record, and because the decision of the Supreme Court of the state, construing the state statute, is conclusive and binding on this court.

4th. The record shows that the plaintiffs in error, the Lyons-Thomas Hardware Company, is a creature of the Texas statute, and was a citizen of said state, and that (*is*) is not, and never was a citizen of the United States.

And the said defendants in error by counsel aforesaid, also move the court to affirm the judgment or decree from which said writ of error purports to have been taken, because, although the record in the case may show this court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only."

We do not believe the motion of defendants in error to dismiss is well taken, and in our judgment the authorities cited in the argument of counsel are not applicable to this case. The plaintiffs in error are all citizens of Texas, the Lyons-Thomas Hardware Co., the Farmers and Merchants bank, and the Paris Exchange bank each being private corporations, the hardware company incorporated under the general incorporation law of the state of Texas. (R. S. of Tex., Arts. 565-66). The two banks are incorporated under the laws of Texas, act of 1871. (Paschal's Digest, Laws of Texas, Vol. 2, Art. 6005).

The question presented by the first and second assignments or specifications of error is clearly a Federal question and gives this court jurisdiction. A private corporation, though incorporated under the laws of a state, is a person, within the meaning of the 14th amendment of the Constitution of the United States, and entitled to its protection the same as an individual. Santa Clara County vs. Southern Pacific Railroad Co., 118 U. S., 394-396; Minneapolis Ry. Co. vs. Beckwith, 129 U. S., 26. In the last case cited, Mr. Justice Fields, speaking for the court, says: "It is contended by counsel as the basis of his "argument, and we admit the soundness of his position, that

"corporations are persons within the meaning of the clause in "question, (citing authorities). We also admit, as contended "by him, that corporations can invoke the benefits of provisions "of the Constitution and laws which guarantee to persons the "enjoyment of property, or afford them the means for its pro- "tection, or prohibit legislation injuriously effecting it. * * And "first as to the alleged conflict of the law of Iowa with the "clause of the 14th amendment, ordaining that no state shall "deny to any person within its jurisdiction the equal protection "of the laws. That clause does undoubtedly prohibit discrimi- "nating and partial legislation by any state in favor of particu- "lar persons as against others in like condition. Equality of "protection implies not merely equal accessibility to the courts "for the prevention or redress of wrongs and the enforcement "of rights, but equal exemption with others in like condition "from charges of every kind."

It has been repeatedly held by this court that the prohibitions in the 14th amendment extend to acts of the state, whether through its legislative, its executive, or its judicial authorities.

Virginia vs. Rives, 100 U. S., 313, 318.
Ex-parte Virginia, 100 U. S., 339, 346.
Neal vs. Delaware, 103 U. S., 370, 397.
United States vs. Cruikshank, 92 U. S., 542.
Scott vs. McNeal, 154 U. S., 39, 45.

The question presented in this case is, can the courts of a state deny to a corporation within the jurisdiction thereof the equal protection of the laws of the state? This question may be subdivided thus: 1st. Can the laws of the state of Texas, or the highest court thereof, by its interpretation of such laws, deny to a corporation within its jurisdiction the same right of

disposition or transfer of its property (*jus disponendi*) which is given to a person or individual like circumstanced under the same laws? 2d. Can the highest courts of the state of Texas, by their construction of the laws of such state, deny to a corporation, because it has become insolvent, the right to sell, mortgage or pledge its property, which is given to all corporations by the law of such state under which it is incorporated? 3d. Can the highest court of the state of Texas deny to a corporation the same right as an individual to mortgage its property with preferences, which existed under the common law in favor of both individual and corporation, and which common law has been adopted by statute in Texas?

It is the settled law of Texas, by an unbroken line of decisions by the Supreme Court of that state for nearly a half century, that an individual, though insolvent and ceasing to do business, may either transfer, mortgage, or pledge, in good faith, any or all of his property, (except his homestead) with preferences, to secure certain of his creditors to the exclusion of all others, and that the general creditors not secured by the transfer, mortgage, or deed of trust, have no interest in the mortgaged property or its proceeds, unless there be an excess after satisfying the debts secured, and that the instrument shown by the record in this case, under which plaintiffs in error claim is a mortgage. McQuinnay vs. Hitchcock, 8 Tex., 33, decided in 1852; Mosley vs. Gainer, 10 Tex., 393; Edrington vs. Rogers, 15 Tex., 188; Baldwin vs. Peet, 22 Tex., 708; Bailey vs. Mills, 27 Tex., 434; Shearon vs. Henderson, 38 Tex., bottom of page 251; Thornton vs. Tandy, 39 Tex., 544; Irion vs. Mills, bottom of pages 317, 318; Frazier vs. Thatcher, 48 Tex., 26; Inglehart vs. Willis & Bro., 58 Tex., 306; The LaBelle Wagon Works Co. vs. Tidball, Vanzant & Co., 59

Tex., 291; Greenlese, Block & Co. vs. Blum, 59 Tex., 124; Stiles vs. Hill, Fontaine & Co., 62 Tex., 429; Ellis vs. Valentine, 65 Tex., 547; Watterman vs. Silberberg, 67 Tex., 100; Smith & Co. vs. Whitfield, 67 Tex., 124; Oppenheimer vs. Haeff & Bro., 68 Tex., 409; Wallis, Landes & Co. vs. Schneider & Davis, 79 Tex., 479; Bank vs. Marshall, 1 Civ. Apps. R., 704; Haas vs. Kraus, 86 Tex., 687, opinion delivered May 24th, 1894. See also Reagan vs. Aikin, 138 U. S., 109, for an opinion of this court as to the instrument being a mortgage and the rights of parties secured by the same under the laws of Texas. It has been repeatedly held by the Supreme Court of Texas, and followed by this court in Reagan vs. Aikin, that the act of the legislature of Texas of the 24th of March, 1879, regulating assignments in Texas, did not repeal the act concerning fraudulent conveyances, and that preferences given by instruments other than such as evidenced an intention to make a general assignment, were not invalid under the laws of Texas unless made under such circumstances as would invalidate them under the statute of Texas concerning fraudulent conveyances. And although it is the settled law of Texas, that in the absence of a general assignment by a failing person, under the act of 24th of March, 1879, a preference by a mortgage or deed of trust is not prohibited by such act, yet the Supreme Court of Texas, in the case at bar, declares a different rule of law as to the Lyons-Thomas Hardware corporation, in the following language:

"Under the statutes in force in this state, if an insolvent "corporation, in contemplation of an assignment under the "statute with intent to give preference to one creditor, should "convey to him property of the corporation; this would be in- "valid as to other creditors, and the property would pass to the "assignee under a subsequent assignment for the benefit of all

"creditors. * * In the application of principles illustrated "by this statute, ought the fact that the insolvent corporation "subsequently made no general assignment and made in effect "only mortgages conveying all of its property, as from the pa- "pers certified by the Court of Civil Appeals appears to have "been the case, to effect the rights of the parties? The mort- "gages, if sustained, would give preferences as fully as would "absolute conveyances, and all the corporate property, if not "more than sufficient to pay the preferred claims, would pass "from the corporation as fully as it would by subsequent assign- "ment." See opinion of Stayton, Chief Justice, in the record, thereby denying to the Lyons-Thomas Hardware corporation the equal protection of the laws of Texas.

See Watterman vs. Silberberg, *supra*, and LaBelle Wagon Co. vs. Tidball, Vanzant & Co., *supra*. In the last case cited, Mr. Justice West, speaking for the court, says: "Assignments "for the benefit of creditors, when they come within the scope "of the act of 24th of March, 1879, are governed by its pro- "visions. In other respects the ancient statute of 13th and "27th Elizabeth, from which our statute of fraudulent convey- "ances are borrowed, and in part copied, and which has been "declared by Lord Mansfield (the very highest authority) to be "itself nothing more than a declaration by act of parliament, of "what the common law was from the beginning, is still in force "here."

There is nothing in the statutes of Texas concerning fraudulent conveyances, or in any other statute of the state (save the act of 24th of March, 1879, concerning general assignments) which prohibits either an individual or corporation from prefering certain of their creditors to the exclusion of all others. (See R. S. of Texas, title Frauds and Fraudulent Conveyances, Arts. 2464 to 2468).

The statutes of Texas, in reference to mortgages of personal property, are as follows: "Every mortgage, deed of "trust, or other form of lien attempted to be given by the "owner of any stock of goods, wares or merchandise, daily ex- "posed to sale in parcels, in the regular course of the business "of such merchandise, and contemplating a continuance of pos- "session of said goods and control of said business, by sale of "goods by said owner, shall be deemed fraudulent and void." This is a section of the general assignment law. (See Sayles' Civil Statutes, Vol. 1, Art. 65 i). "Every chattel mortgage, "deed of trust, or other instrument of writing intended to oper- "ate as a mortgage of, or lien upon personal property, which "shall not be accompanied by an immediate delivery, and be "followed by an actual and continued change of possession of "the property mortgaged or pledged by such instrument, shall "be absolutely void as against the creditors of the mortgagor or "person making the same, and as against subsequent purchasers "and mortgagees or lien holders in good faith, unless such in- "strument, or a true copy thereof, shall be forthwith deposited "with, and filed in the office of the county clerk of the county "where the property shall then be situated, or if the mortgagor "or person making the same be a resident of this state, then of "the county of which he shall at the time be a resident." (Act of April 22d, 1879. Sayles' Civil Statutes, Vol. 2, Art. 3190 b.) A mortgage of personal property by an individual or partnership, followed by a delivery of possession of the mortgaged property to the mortgagee, or trustee, under the provisions of this statute, has been uniformly held by the Supreme Court of Texas to be such a pledge of the property that it could not be taken from the possession of the mortgagee by legal process until the debt secured thereby was first paid. (Stiles vs.

Hill, Fontain & Co., 62 Tex., 429; Hudson vs. Wilkinson, 61 Tex., 603). It will be observed that in the statute just quoted above the word *person* is used more than once as the party making the mortgage, and the word person is used in our statute on fraudulent conveyances, assignments, etc. Art. 3140 of the Revised Statutes of Texas, provides as follows: "The "following meaning shall be given to each of the following "words, unless a different meaning is apparent from the context: "1. 'Property' includes real and personal property. 2. 'Person' "includes a corporation."

The chattel mortgage executed by the Lyons-Thomas Hardware Co. to secure the other plaintiffs in error herein was only upon a part of the company's personal property. It was executed in strict accord with the statute quoted, (Sayles' Civil Statutes, Vol. 2, Art. 3190 b). The instrument was duly deposited with the county clerk of Lamar county, Texas, and the property immediately delivered to the trustee, Harrison, as a pledge to secure the debts mentioned in the mortgage. (See extracts from transcript of record, pp. 43 to 49, 54 to 56 and 60). A mere glance at the record will show that plaintiffs in error other than the Lyons-Thomas Hardware Co. and the trustee Harrison, have no interest in or connection with the other mortgages or deeds of trust shown by the record. (Extract from Tr. of R., pp. 36 to 42).

The judge of the district court of Lamar county, Texas, found all of the mortgages or deeds of trust executed by the Lyons-Thomas Hardware Co. void and not authorized by law, for the reason alone, "that they attempted to prefer certain of its creditors to the exclusion of all others." (Ext. from Tr. of R., p. 61). The laws of Texas, under which the Lyons-Thomas Hardware Co., and the Farmers and Merchants bank, and

Paris Exchange bank (plaintiffs in error) were incorporated, expressly provides that a corporation may execute a mortgage or pledge of its property to secure its creditors, or take a conveyance or mortgage to secure debts owing to it. The provisions of the statutes of Texas applicable to this question are as follows: (R. S. of Texas, Art. 575.) "Every private corporation, as such, has power * * * * 4. To hold, purchase, "sell, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation may require, and also "to take, hold and convey such other property, real, personal "or mixed, as shall be requisite for such corporation to acquire, "in order to obtain or secure the payment of any indebtedness "or liability due or belonging to the corporation." * * * "7. To enter into any obligation or contract essential to the "transaction of its authorized business." (See also act of 1871, P. D. of Laws, Art. 5942). Art. 577: "Corporations shall "have power to borrow money on the credit of the corporation "not exceeding its authorized capital stock, and may execute "bonds or promissory notes therefor, and may pledge the "property and income of the corporation." (See also act of 1871, P. D. of Laws, Art. 5944). Art. 600: "Any corporation may convey lands by deed, sealed with the common seal "of the corporation and signed by the president, or the presiding member, or trustee of said corporation, and such deed, "when acknowledged by such officer to be the act of the corporation, or proved in the manner prescribed for other conveyances "of land, may be recorded in like manner and with the same "effect as other deeds."

A private corporation is a legal entity, a collection of individuals. Mr. Blackstone says the following five powers are inseperably incident to a corporation:

1. To have perpetual succession.

2. To sue or be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as natural persons may.

3. To purchase lands and hold them for the benefit of members and their successors.

4. To have a common seal.

5. To make by-laws for the better government of the corporation. 1 Bl. Com., 475, 476; see also Kyd on Corporations, 69, 104; 2 Kent. Com., 277.

In Barry vs. Merchants Exchange Co., 1 Sand. Ch. (N. Y.) 280, the rule is thus laid down: "Every corporation has as such at common law, the capacity to take and grant property and to contract obligations in the same manner as an individual. Corporations, except when restrained by law, have the absolute *jus disponendi* of their property, whether of lands or chattels, and in its exercise are unlimited as to objects and quantity." In Burton's Appel., 57 Pa. St., 213, the court observed: "The right of alienation is an incident of ownership and belongs to a corporation as well as to an individual, when no restraint is imposed in the charter." Citing Dana vs. Bank of U. S., 5 W. & S., (Pa.) 243; Walker vs. Vincent, 10 Pa. St., 368; Sutton's Hospital, 10 Coke R., 30; Ang. & A. Corp., Sec. 188.

In the case of Jones vs. Guaranty and Indemnity Co., 101 U. S., 625, this court, speaking through Mr. Justice Swayne, said: "At the common law every private corporation has, as an incident to its existence, the power to acquire, hold and convey real estate, except so far as restrained by its charter, or by act of parliament. This comprehensive capacity included also personal effects of every kind. The *jus disponendi* was without limit or qualification. It extended to mortgages given to secure the payment of debts."

Art. 3128, R. S. of Texas, provides that "The common law of England (so far as it is not inconsistent with the constitution and laws of this state) shall, together with such constitution and laws, be the rule of decision and shall continue in force until altered or repealed by the legislature."

We have shown that under the common law, both in England and this country, a corporation has the *jus disponendi* the same as a natural person, and that in reference to the sale, assignment or mortgage of its property for the purpose of paying or securing its debts, contracted in the course of its legitimate business, it has the same power as an individual to prefer its creditors, unless prohibited by statute, or by its articles of corporation. This power does not have to be conferred upon the corporation by its charter or the law under which it is incorporated, as seems to have been held in this case by the Supreme Court of Texas, but it is inherent, and exists in the corporation the same as an individual by virtue of its ownership of, and dominion over its property, and may be lawfully exercised by the corporation, in the same manner that it may be exercised by an individual, unless prohibited by statute. The right of ownership or dominion over its property existing in a corporation (which is but a collection of individuals) within the jurisdiction of a state is shielded and protected by the clause of the 14th amendment of the Federal Constitution from the laws of such state, whether enacted by its legislature or decided by its courts which discriminate against and deny to such corporation equal rights, or protection of its laws.

There is no statute of Texas authorizing an individual to prefer his creditors, but it exists by virtue of the common law, unless prohibited by statute, (LaBelle Wagon Co. vs. Tidball, Vanzant & Co., *supra*), and a chattel mortgage by an individual

of all of his property, though insolvent and ceasing to do business, preferring in good faith some of his creditors to the exclusion of all others, has been declared to be valid under the laws of Texas since the adoption of the common law in 1840, down to the present time. It has become a rule of property in Texas, yet this right of property, and the equal protection of such right, under the laws of Texas, has been denied plaintiffs in error by the highest judicial tribunal in Texas, upon the sole ground that the Lyons-Thomas Hardware Co. was a corporation and insolvent, when the statutes of Texas no more prohibit a corporation from prefering some of its creditors to the exclusion of others, than do they prohibit an individual from making such preference, and when the statute expressly provides that corporations shall have power to borrow money and pledge the property of the corporation. Rev. Stat. of Texas, Art. 577. The Supreme Court of Texas held in this case that this statute only applied to solvent corporations in the prosecution and continuance of the business of the corporation, and that a mere paying or securing an indebtedness was not its business. This kind of argument does not do justice to a great court like the Supreme Court of Texas. Suppose the Lyons-Thomas Hardware Co. had been a partnership, could it be said that the paying or securing of its debts was not within the scope of the partnership business? Again, supposing the Hardware Co. a general partnership, circumstanced as it was, and denied by the Supreme Court of Texas, the same right to prefer its creditors by mortgage which an individual has by the laws of Texas, under the same circumstances, can it be doubted that this denial of the equal right and protection of the law would present a Federal question, and give this court jurisdiction under the clause of the 14th amendment of the Federal Constitution, which pro-

hibits a state from denying to any person within its jurisdiction the equal protection of the laws? Suppose the highest court of a state should deny a corporation within its jurisdiction the right to a writ of attachment or garnishment, or execution, or any process which an individual or person may have by the law of the state, under the same circumstances, would this court hesitate for a moment to take jurisdiction of a writ of error to such highest court of the state presenting such question? Under the statute of Texas it is provided that "every private corporation, as such, has power * * * to hold, purchase, sell, mortgage or convey," etc. * * *

"Corporations shall have power to borrow money, * * and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation." It is a universal rule of construction that a word which has no technical meaning is to be taken according to its usual acceptation. The word "every" is thus defined in Webster's Dictionary: "All the parts which comprise a whole, considered in their individuality. The separate individuals which constitute a whole, regarded one by one."

The expression in the statute "every private corporation," embraces necessarily solvent as well as insolvent private corporations, private corporations in failing circumstances, private corporations in straightened circumstances. There is no exception in the statute, but it in terms unmistakable authorizes every private corporation to sell, mortgage, or pledge its property as the purposes of the corporation shall require, it thereby leaves to the corporation the discretion of determining when to mortgage, what to mortgage, and to whom to mortgage. If the transaction be honest, if the corporation honestly owed the debts secured, and its purpose was to secure the debts, all of which is

not gainsaid, did the Supreme Court of Texas have the power to limit the operation of the statute to solvent corporations, continuing business, and thereby deny to the Lyons-Thomas Hardware Co., because of its insolvency, or even inability to continue its business, the right which is given to all private corporations by the statute of the state, without exception? Can the laws of a state thus declared by its highest court, discriminate against a corporation becoming insolvent, and take away its *jus disponendi* before any judicial proceedings of any kind were instituted against it? The right to dispose of property is the property itself; property would be valueless if its disposition were prohibited. Insolvency of the corporation, or inability to continue its business would justify a court of equity upon proper proceedings in taking charge of its property by the appointment of a receiver, but until a court of equity has, by proper proceedings, taken charge of the company's property, or at least until the proceedings have been commenced, the corporation, though insolvent, or even contemplating a cessation of its business, has absolute dominion over its property, which cannot be taken from it except by due process of law. Graham vs. Railroad Company, 102 U. S. 148; Wabash, St. Louis & Pacific Ry. Co. vs. Ham, 114 U. S., 587; Fogg vs. Blair, 133 U. S., 534, 541; Hollins vs. Brierfield Coal & Iron Co., 150 U. S., 371.

Art. 606 of the Revised Statutes of Texas, upon which the Supreme Court of Texas based its decision to the effect that the Lyons-Thomas Hardware Co. had lost its dominion over its property by reason of its insolvency, contemplates an actual dissolution of the corporation before the officers of the corporation become trustees for the creditors. The language of the statute is, "*upon the dissolution* of any corporation already created by

or under the laws of this state, unless a receiver is appointed by some court of competent authority, the president and directors and managers of the affairs of the corporation at the time of its *dissolution*, etc., shall be trustees of the creditors," etc. These words must be taken according to their ordinary acceptation. Insolvency of a corporation or a cessation of business does not dissolve the corporation. Savings Bank vs. Sachtleben, 67 Tex., 425.

Says Mr. Morawetz: "The company still continues to be a corporation in the eye of the law, * * * and may resume and begin its business anew. * * * The dissolution of a corporation may occur in either of the following ways: first, by expiration of the charter. Secondly; by failure of any essential part of the coporate organization; *provided*, *it* cannot be restored. Thirdly; by a dissolution and surrender of the franchise with the consent of the state. Fourthly; by legislative enactment, if no constitutional provisions be violated. Fifthly; by forfeiture of the franchise by judgment of dissolution obtained in a proper judicial proceeding." See Morawetz on Corporations, Sec. 1004.

The same rule of construction which this court has placed on our statutes in reference to general assignments should obtain under this statute. It has been held by the Supreme Court of Texas that where there was no assignment under the statute of Texas, the statute did not tak away the right to prefer creditors under the common law. LaBelle Wagon Co. vs. Tidball & Co., *supra;* Reagan vs. Aikin, *supra*. So also where there is no dissolution of the corporation, this statute does not effect the corporation nor its power to pledge its property to secure debts. Bunch vs. West et al., 134 Ill., 258, in point; Barnam vs. Hart, 119 N. Y., 101; Paulding vs. Crome S. Co., 94 N. Y., 335.

This trust fund doctrine and the expressions that have been used by this court in different decisions to the effect "that the assets of an insolvent corporation constitute a trust fund for the payment of its debts," have been reviewed by this court in Hollins vs. Brierfield Coal & Iron Co., *supra*, in the following language:

"While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation [redacted] for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pomeroy's Equity Jurisprudence, Sec. 1046, they "are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor."

"To the same effect are decisions of this court. The case of Graham vs. Railroad Co., 102 U. S., 148, was an action by a subsequent creditor to subject certain property alleged to have been wrongfully conveyed by the corporation debtor, to the satisfaction of his judgment. And the very proposition here presented was then considered, and in respect to it, the court, by Mr. Justice Bradley, said (page 160): "It is contended, however, by the appellant, that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is mere trustee, holding its property for the benefit of its stock holders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

"We do not concur in this view. It is at war with the

notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, and not adverse to the corporate interests, but coincident with them.

"When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stock-holders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation, as any man's property is his."

"With reference to the suggestion in this last paragraph, it may be observed that the court does not attempt to determine who are proper parties to maintain a suit for the administration of the assets of an insolvent corporation. All that it decides is, that when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders rather than to the corporation itself. In other words, and that is the idea which underlies all these expressions in reference to "trust" in connection with the property of a corporation, the corporation is an entity, distinct from its stock-holders as from its creditors. Solvent, it holds its property as any indi-

vidual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stock-holder who, though equitably interested in, has no legal right to the property. Becoming insolvent, the equitable interest of the stock-holders in the property, together with their conditional liability to the creditors, place the property in a condition of trust; first, for the creditors, and then for the stock-holders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stock-holders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder.

Again, in the case of the Wabash, St. L. & P. R. Co. vs. Ham, 114 U. S., 587, it appeared that four railway corporations, owing debts, were consolidated under authority of law, and, by the terms of the consolidation agreement, the new corporation was to protect the debts of the old. Subsequently, the new corporation executed a mortgage on all its property, and in a contest between the mortgagees and the unsecured creditors of one of the constituent companies, the court held that the lien of the mortgagees was prior. In respect to this, Mr. Justice Gray (page 594) thus stated the law: "It was contentended that the property of the Toledo & Wabash Railway Company was a trust fund for all its creditors, and that upon the consolidation the Toledo, Wabash & Western Railway Company took the property of the Toledo & Wabash Railway Company charged with the payment of all its debts. The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense, that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all

its creditors are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

The case of Fogg vs. Blair, 133 U. S., 534, 541, presented a similar question, and this court, by Mr. Justice Field, observed: "We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders; it does not mean that the property is so effected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In the case of Hawkins vs. Glenn, 131 U. S., 319, 332, which was an action brought by the trustee of a corporation against certain of its stockholders to recover unpaid subscriptions, and in which the defense of the statute of limitations was pleaded, Chief Justice Fuller referred to this matter in these words: "Unpaid subscriptions are assets, but have frequently been treated by courts of equity as if impressed with a trust *sub modo*, upon the view that, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust, and that, therefore, statutes of limitation do not commence to run in

respect to them, until the retention of the money has become adverse by a refusal to pay upon due requisition."

"These cases negative the idea of any direct trust or lien attaching to the property of a corporation in favor of its creditors, and at the same time are entirely consistent with those cases in which the assets of a corporation are spoken of as a trust fund, using the term in the sense that we have said it was used.

The same idea of equitable lien and trust exists to some extent in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is, therefore, sometimes said, not inaptly, to be held in trust for the partnership creditors, or, that they have an equitable lien on such property. Yet, all that is meant by such expressions is the existence of a equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien, or a direct trust.

"A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors the corporation is simply a debtor, and does not hold its property in trust, or subject to a

lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor, all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

In the case of Bank of Montreal vs. Potts Salt & Lumber Co., 90 Mich., 345, 51 N. W. Rep., 512, (a case on all fours with this,) the Supreme Court of Michigan says: "Nor is it the law of this state that as soon as a corporation becomes insolvent the directors of the corporation become the trustees for all the creditors alike in such sense as to prevent their giving valid security by way of preference to one of the directors or stockholders. We are aware that the decisions of the various states are not uniform as to this question and that a number of very eminent text writers have deprecated a state of the law which admits of such preference. But to adopt the language of Dillon, Justice, in Buell vs. Buckingham, 16 Iowa, 284: 'This condition of the law may constitute a good legislative reason. * * * But the legislature must furnish the remedy.'" See also Hospes vs. Car Co., 48 Min., 192, 50 N. W. Rep., 1117; Brown vs. Grand Rapids Parlor Furniture Co., 58 Fed. Rep., 286; Alberger vs. National Bank of Commerce, 123 Mo., 313. It may be proper to remark that the general incorporation law of Texas seems to have been borrowed from the statutes of Missouri, some of the provisions in the statutes of the two states being identical. The case cited from Missouri is directly in point. The Supreme Court of that state thus passes upon the question:

"It was said in Missouri, as long ago as Murray vs. Cason, (1852) 15 Mo., 381, that 'it is not necessary to quote books for the purpose of showing that a debtor in failing circumstances may give a preference to one or more of his creditors, to the exclusion of others.' Such a preference, made in good faith, may undoubtedly be given by an individual, but it is claimed that a private corporation has no such right. This claim is planted on the ground that, without any action of a court, the mere insolvency of a corporation transforms its assets into a different sort of trust fund from that which they previously constituted,—into a trust fund for the benefit of all its creditors,—which fund cannot lawfully be applied otherwise than equally among them. This theory seems to have a singular facination to some learned jurists, but in our opinion it is wholly untenable, as applied to the facts of such a case as that before us, under the law of Missouri. No doubt the assets of a business company are properly chargeable with its debts, and its directors are charged with a trust to apply its assets to to those debts. But, in the absence of legislation restricting that right, the company, within the proper range of its corporate business, has the same right, while a going concern, to determine to which of its debts its assets shall be applied, as has an individual in like circumstances. It is a going concern, in contemplation of law, so long as the property of the company remains in its possession, unaffected by liens or process of law. While that condition exists, it is difficult to see upon what basis of principle a distinction can be established between its right to exercise the powers of ownership in respect of such property and the right of control (within the limitations of good faith) conceded in similar circumstances to an individual. The right of the latter to give a preference to one creditor over another is usually

grounded on the power of disposition incidental to the ownership of property. That ground exists with equal strength as to a business corporation in this state. 'The property or business of the corporation shall be controlled and managed' by its directors, under our law. Rev. S. 1889, Sec. 2772. Upon dissolution of the company, the president and directors or managers become trustees to collect the assets, pay the debts, and distribute any surplus to the stockholders; being liable, in so doing, to the extent of the property which comes to their hands. Rev. St. 1889, Sec. 2513. The courts are invested with statutory power to enforce a proper performance of duty by all officers of corporations at the instance of creditors as well as of stockholders, and may even take charge of the corporate property and business, through the agency of a receiver, if necessary, for that purpose. Id. Secs. 2790-2792. But there is nothing in the law of this state which can properly be construed to constitute the directors trustees for all general creditors alike, or to limit their power of dealing in good faith with the property by way of preference to one creditor, so long as the company, undissolved, holds the title to the property. Upon dissolution of the company, or the intervention of a court, that power becomes restricted within the field defined by the statutes already cited. But those limitations apply only to the facts described in the statutes, and not otherwise. If such an important restriction upon the ownership of property was designed by the law to be imposed on corporations, and upon the power of the company officers to deal with its property in their hands, as is here claimed by the plaintiffs, it is believed that such restriction or limitation would have been expressed by the lawgivers with reasonable clearness. The statute law itself furnishes reasons for so believing. In the chapter governing limited partnerships, it

is declared that no transfer, etc., of the firm's property, by way of preference to any creditor, shall be valid, if the firm is insolvent, or in contemplation of insolvency. Rev. St. 1889, Sec. 7204. In the present law of assignments for the benefit of creditors, preferences are distinctly forbidden, and every assignment shall be construed to be for the benefit of all creditors, in proportion to their respective claims. Id. Sec. 424; Crow vs. Beardsley, (1878) 98 Mo., 435. But for such provisions, assignments with preferences to particular creditors would be lawful and valid, as they were in former years. Bell vs. Thompson, (1831) 3 Mo., 84. If a corporation makes an assignment for the benefit of creditors, such a transfer comes within reach of the section last cited, and no preference could lawfully be given by that assignment. But mere insolvency, we think, cannot justly be held to produce the full consequences of a voluntary assignment, without some act by the corporation or its managers. If such were its effect, for the reason advanced by plaintiffs in this case, namely: that insolvency impresses at once a trust, for all creditors alike, upon the corporate property, depriving the directors of power to dispose of it by sale or pledge, then how could the directors be said to have power, as this court has expressly held they had, to transfer that property to an assignee for any purpose? Hutchinson vs. Green, (1886) 91 Mo., 367, 1 S. W., 853. Their right to make a voluntary assignment for the benefit of creditors, when the concern has reached a state of insolvency, depends on the same right of control over the corporate property which will sustain a transfer by way of preference to one creditor, so long as that control has not been limited by legal or equitable proceedings against the corporation or the property. To give mere insolvency the effect claimed by plaintiffs would require the aid of positive law

on the subject, which in Missouri is, at this time, wanting. Positive law is necessary to define, at least, the time at which the right of control of propercy incident to its ownership by the corporation shall cease, or, in other words, what shall constitute statutory insolvency, should the lawmakers consider the adoption of such a theory as that contended for by plaintiffs desirable.

In the present condition of the law of Missouri, we think the creditor of a corporation has the same right to secure, by superior diligence or persistency, and to retain, a preference for his claim against a private corporation, that he would have were his debtor an individual engaged in the same line of business, provided always that the transaction is honest; that is to say, not a mere cover to a purpose to hinder, delay, or defraud other creditors of the failing debtor. This conclusion we believe to be the necessary deduction from common-law principles still in force in this state."

The statute of Texas, under which the plaintiffs in error, Farmers and Merchants and Paris Exchange banks, were incorporated, expressly provides that corporations have power to take and hold such other property, real, personal and mixed as shall be requisite for such corporations to acquire in order to obtain or secure the payment of any indebtedness due to or belonging to the corporation. There is nothing in the laws of Texas prohibiting the banks from loaning money to a corporation; there is nothing in the laws of Texas prohibiting the banks from taking security from a corporation for money loaned to it, and used by it in the course of its legitimate business, any more than there is prohibiting such banks from taking security from a person or individual.

Saye Mr. Morawetz on Private Corporations: "A trading corporation is in many respects like a trading co-partnership. * * * It is apparent that a business corporation cannot carry on its business successfully unless it is able to act substantially in the same manner as an individual or co-partnership would act under similar circumstances." Vol. 1, Sec. 320.

Again, Mr. Morawetz says: "Corporations have implied authority to borrow money and incur debts for the purpose of accomplishing their legitimate purposes, unless the contrary be expressly provided." Morawetz on Corporations, Sec. 342.

"A corporation has implied authority to pledge any personal property which it may lawfully dispose of as security for any debt which it may lawfully contract." Id. Sec. 349.

Can the highest court of the state, by judicial legislation, engraft into the statute a law more burdensome upon corporations within its jurisdiction, than is imposed upon persons or other corporations, and thereby deprive a class of corporations of the equal protection of the laws of the state? It is the duty of a state and of every branch of the state government, executive, legislative, and judicial, to see that its laws operate equally and impartially upon all *persons* or class of *persons* within its jurisdiction, and the 14th amendment of the Constitution of the United States simply guarantees that this shall be done. Miller on the Constitution, pp. 661, 662.

It is settled by the decisions of this court that upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment is against a right claimed under the Constitution of the United States, this court is not bound by that court's construction of the statute. Scott vs. McNeal, 154 U. S., 34; Huntington vs. Attrill, 146 U. S., 657; New Orleans Waterworks vs. Louisiana Sugar Co., 125

U. S., 18, 38; Mobile & Ohio Railroad vs. Tennessee, 153 U. S., 486.

That a corporation within the jurisdiction of a state has been denied the equal protection of the laws of such state, by any branch of the state government, presents a Federal question, which gives this court jurisdiction by writ of error to review the judgment of the highest court of the state.

So also that a statute of a state authorizing a case pending on appeal to be determined upon certified questions, without the record, and without giving the parties to the appeal a chance to be heard upon what shall be contained in the questions certified, or providing any means by which an error in the certified questions might be corrected, and which law does not give the parties to the appeal any right to be heard on the certified questions, and that the determining the rights of plaintiffs in error by the highest court of Texas, under said statute, was without due process of law, presents a Federal question, and this court must construe the laws and statutes of Texas for itself in determining such questions.

That these questions were presented to the highest court of the state of Texas, and were directly involved, so that the said court could not have given judgment in this case without deciding them, we think cannot be doubted; at any rate, this appears from the record by clear and necessary intendment, which this court has held sufficient. Powell vs. Brunswick County, 150 U. S., top of page 440; Sayward vs. Denny, 158 U. S., 180; Eureka Lake Co. vs. Yuba County, 116 U. S., 410.

The opinions in this case of the highest courts of Texas, to which this court, under rule 8, may look for the questions involved, clearly show that these questions were presented to said courts and were necessarily involved, and must have been, and

were in fact, passed upon by said courts adversely to plaintiffs in error. See Philadelphia Fire Association vs. New York, 119 U. S., 101, (copies of said opinions are in the record).

Besides, plaintiffs in error, in their petition for a writ of error from the Supreme Court of Texas to the Court of Civil Appeals for the fifth supreme judicial district of Texas, set up these questions, to-wit: That the said Court of Civil appeals had denied to the Lyons-Thomas Hardware Co. the equal right and protection of the laws of Texas, to-wit: the right under the laws of Texas to dispose of its property by way of mortgage to secure its debts, the same as an individual or any corporation. And also set up that the law of Texas under which the questions in this case were certified to the Supreme Court of Texas was unconstitutional, and that the proceedings and decisions of the Supreme Court of Texas and Court of Civil Appeals upon said certified questions deprived plaintiffs in error of their property rights without "due process of law." See copy of said petition for writ of error in the record.

Under the statutes of Texas, a party desiring to sue out a writ of error before the Supreme Court of Texas, to a Court of Civil Appeals of said state, must present his petition for a writ of error to said Supreme Court, stating, among other other things, the ground upon which said writ of error is prayed. Art. 1011b, Supplement to Sayles' Texas Civil Statutes, Title, Courts, page 192. And in all cases of writ of error in the Supreme Court of Texas, the trial is only upon the questions of law upon which the writ of error was allowed. Id. Art. 1016c., p. 196. So that the petition in this case for writ of error from the Supreme Court of Texas to the Court of Civil Appeals, fifth district, may be looked to by this court for the questions raised. Arrowsmith vs. Harmoning, 118 U. S., 194.

Until the Appellate Courts of Texas passed upon the questions raised, plaintiffs in error, including the Lyons-Thomas Hardware Co, could not know that the equal protection of the laws of Texas would be denied them. This denial of equal rights, or the equal protection of the laws of Texas by the judicial tribunals of the state, then becomes subject to the revisory powers of this court. See Virginia vs. Rives, 100 U. S., on pages 319 to 322.

The questions raised by the third assignment or specification of error also presents a Federal question. The plaintiffs in error could not complain of the law of the state of Texas under which the questions in this case were certified to the Supreme Court of Texas, until the case had been decided upon such certified questions in pursuance of the statute of the state. Said statute is as follows:

"Section 1. Be it enacted by the legislature of the state of Texas; That Section 35, Chapter 15 of the general laws of Texas, of the acts of the special session, 1892, twenty-second legislature, be so amended as to read as follows:"

"Section 35. Whenever, in any case pending before the Court of Civil Appeals, there should arise an issue of law which said court should deem it advisable to present to the Supreme Court for adjudication, it shall be the duty of the presiding judge of said court to certify the very question to be decided to the Supreme Court, and during the pendency of the decision by the Supreme Court the cause in which the issue is raised shall be retained for final adjudication in accordance with the decision of the Supreme Court upon the issue submitted." Approved May 2d, 1893. See Laws of Texas, 23d legislature, 1893, p. 100. Supplement to Sayles' Texas Civil Statute, Art. 1081f, pages 225, 226.

The section which was amended by the act of May 2d, 1893, reads as follows: "Whenever, in any case pending before the Court of Civil Appeals, of which said Court of Civil Appeals has final jurisdiction, there should arise an issue of law which is novel, or presenting a question of first impression," etc., then follows the balance of the section in the exact wording of the section as amended. Laws of Texas, first called session, 1892, p. 31.

This statute authorizing questions to be certified by the Courts of Civil Appeals the Supreme Court of Texas gives the parties to the suit in which the question is certified no right to be heard as to what shall be contained in the certificate, nor is there any provision by which they may controvert or correct the certificate by the record, nor does it provide that the parties shall be heard on the certified questions in the Supreme Court of Texas, nor is there any rule of said Supreme Court of Texas providing for such a hearing. The certified questions in this case by the Court of Civil Appeals for the second district, upon which the question of the validity of the chattel mortgage given by the Lyons-Thomas Hardware Co. to secure the other plaintiffs in error herein was determined by the Supreme Court of Texas and held conclusive by the Court of Civil Appeals for the fifth district, contains no part of the record, nor does it show how the question arose, or the facts upon which it arose. It is an abstract question, "whether or not a preferential deed of trust, executed by a private trading corporation after it has become insolvent, and *consequently* ceased to carry on its business, without any intention of resuming the enterprise, is void as against the unsecured creditors of such corporation." How could that court determine the case shown by the record and ad-

judicate the rights of the parties to this mortgage under this certified question?

The answer and pleas of intervention of the beneficiaries in this mortgage, alleged, among other things, that they were *bona fide* creditors and mortgagees of the Hardware Co. for a valuable consideration, without notice of plaintiffs' claims, and without notice of the insolvency of said company; that the mortgage to them only embraced a part of the company's property, and was made prior to the other mortgage and deed of trust; that when they took possession of the property they had no notice of any other mortgage or deed of trust, (Ext. from record, p. 52); that the notes secured by this mortgage were for money borrowed by said Hardware Co., and used by it in carrying on its business; that the amount of said notes were less than the capital stock of said company, and that said hardware company had the power, under its charter, to borrow said money, to execute said notes therefor, and to secure the same by mortgage or pledge of its property. (Ext. from record, bottom of p. 29, top of p. 30).

The district court of Lamar county sustained a general demurrer to this answer, and the Court of Civil Appeals held that the decision of the Supreme Court on the certified question concluded these plaintiffs in error on their fifth assignment of error, calling in question the action of the court in sustaining this demurrer. Again, these beneficiaries, the two banks and W. T. Gunn, et al., filed a general demurrer to the petition of appellees in the district court on the ground that said petition stated no cause of action against them or either of them; did not show that plaintiffs had been deprived of any right by them or either of them, or that they or either of them had been guilty of any wrong. (Ext. from record, p. 57). This certainly challenged

the legal sufficiency of the petition in stating a cause of action against them. This demurrer was overruled by the district court, and the action of the court assigned as error in the first assignment of error. The Court of Civil Appeals held that the decision of the Supreme Court of Texas on the certified question was conclusive against these plaintiffs in error on this assignment of error.

The entire record shows that the Lyons-Thomas Hardware Co. had not ceased to do business at the time it gave the mortgage to secure the two banks, and this is borne out by the last opinion of the Supreme Court of Texas, rendered in the case by Associate Justice Brown, in which he says:

"In this case, upon a question certified by the Court of Civil Appeals, this court held that an insolvent corporation, which had ceased to do business, or which, by the making of an instrument conveying all its property, incapacitates itself for continuing its business, cannot make a mortgage or deed of trust by which it gives a preference to some of its creditors over others. (Lyons-Thomas Hardware Co. vs. Perry Stove Manufacturing Co., 24 S. W. Rep., 16). We see no reason to change our opinion on that question."

"It is asserted by plaintiffs in error that there was no evidence to sustain the conclusion of the court that the Lyons-Thomas Hardware Co. was insolvent at the time the deeds of trust were executed. It is true that some of the officers of the company stated that it was not insolvent at that time. But the evidence shows, without doubt, that the company was largely indebted; that to secure a part of its creditors only, it conveyed and delivered to Harrison, trustee, all of its assets, with power to convert them into money and to apply the money to the payment of the debts named. If there was more than sufficient to

pay all, why convey its entire property to secure the payment of a portion of its debts, leaving a large amount unprovided for? By these acts, which occurred within a few hours of each other, it declared in most unmistakable terms its inability to pay its debts, terminated its business and having not a dollar with which to buy another stock of goods, no hope of resuming could exist except the bare contingency of making a compromise with its creditors."

The learned judge who delivered this opinion evidently overlooked the law that property is not an essential, nor an integral part of a corporation, and, therefore that the insolvency of a corporation does not terminate its existence, nor is it terminated even by the appointment of a receiver. Boston Glass Manufacturing Co. vs. Langdon, 24 Pick., (Mass.) 52; Coburn vs. Boston Paper Mach. Co., 10 Gray., (Mass.) 245; Shenandoah V. R. Co. vs. Griffin, 13 Am. & Eng. R. R. Cases, 120; Taylor vs. Columbian Ins. Co., 14 Allen (Mass.) 353.

This decision is placed upon the ground that the corporation, by giving the chattel mortgages within a few hours of each other, upon all its property, incapacitated itself for continuing business, and that such incapacity terminated its business. This is quite a different state of facts from the questions certified, to the affect that the corporation had already ceased business at the time it gave the first mortgage securing the two banks. Yet, the rights of plaintiffs in error, (whose appeal had been perfected in the Supreme Court of Texas before the Courts of Civil Appeals had been created, and before the law authorizing questions to be certified by such courts to the Supreme Court of the state, and who were entitled to a hearing upon the record) were thus determined and their property taken away from them upon an abstract proposition of law not in the record.

The Supreme Court of Texas had no jurisdiction under a certificate of a mere abstract proposition of law. The issue or question of law arising in the case could only be determined from the record in the case, or a sufficient part of it to show how the question arose and the facts upon which it must be determined.

This question has been passed upon by this court under a similar law of congress authorizing questions certified to the Supreme Court of the United States by the Circuit Courts of Appeals, and this court has held that it has no jurisdiction of a question certified unless so much of the record or facts shown by the record upon which the question arises and must be determined is embraced in the certificate. Cincinnati, Hamilton and Dayton Railroad Co. vs. McKeen, 149 U. S., 259; see also Columbus Watch Co. vs. Robbins, 148 U. S., 266.

The statute in question contemplated that the rights of parties to an appeal pending in a Court of Civil Appeals could be finally determined and adjudicated by the Supreme Court of Texas upon a certificate of a mere abstract proposition of law, without any of the record, or facts in the record to show how the question arose, and without a hearing by the parties, (See opinion of Gaines, Justice, in Darnell vs. Lyon, on motion for rehearing, 85 Tex., 473) and is obnoxious to the 14th amendment to the Federal Constitution, which provides, among other things: "Nor shall any state deprive any person of life, liberty or property without due process of law."

"Due process of law" means a course of legal proceedings before a tribunal authorized by the Constitution, or the law of its creation, to pass on the subject matter of the suit, according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of

private rights, in which the citizen is given an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. See Pennoyer vs. Neff, 95 U. S., 733-34; Kennard vs. La. ex. rel. Morgan, 92 U. S., 480; Stewart vs. Palmer, 74 N. Y., 191; Scott vs. McNeal, 154 U. S., on p. 46.

It means *law in its regular course of administration* through courts of justice. 2 Kent. Com., 13; Wynehamer vs. People, 13 N. Y., 395; Ryan vs. State, 30 Wis., 146.

This statute is violative of the Constitution of Texas, because it abridges the appellate jurisdiction of the Courts of Civil Appeals, and enlarges the jurisdiction of the Supreme Court as fixed by the Constitution, and authorizes said Courts of Civil Appeals, in any and all cases, to certify any and all questions of law arising in said cases, to the Supreme Court of Texas for decision, and without exercising their appellate jurisdiction provided by the Constitution by deciding the cases, they shall simply *retain them* for *adjudication* in accordance with the decision of the Supreme Court, and the Supreme Court of Texas had no jurisdiction to pass upon and determine the certified questions, and its decision and judgment thereon was without "due process of law." See the dissenting opinion of Chief Justice Stayton in Darnell vs. Lyon, 85 Tex., pages 459-472, and authorities cited.

The amendment adopted in 1891 to Art. V, Sec. 3 of the Constitution of Texas, provides as follows: "The Supreme Court shall have appellate jurisdiction only except as herein provided, which shall be co-extensive with the limits of the state. Its appellate jurisdiction shall extend to questions of law *arising in cases* of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the

legislature may prescribe. Until otherwise provided by law, the appellate jurisdiction of the Supreme Court shall extend to questions of law *arising in the cases* in the Courts of Civil Appeals in which the judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law, or where a statute of the state is held void," etc. See joint resolutions of the legislature of Texas, approved April 28, 1891, Laws 22d Legislature, (1891) page 197.

The act of the legislature amending the Revised Statutes and putting in operation this amendment, is as follows: Art. 1011. "That the Supreme Court shall have jurisdiction co-extensive with the limits of the state which shall extend to questions of law *arising* in all *civil cases* of which the Courts of Civil Appeals have appellate but not final jurisdiction."

Art. 1011a. "All *causes* shall be carried up to the Supreme Court by writs of error issuing from the Supreme Court to the Courts of Civil Appeals upon final judgments, and not on judgments reversing and remanding causes, except in the following cases:" Then follows eight exceptions not material to this case. See Acts Legislature of Texas, special session of 1892, p. 20.

Where the Constitution establishes a court and fixes its jurisdiction, the legislature cannot, by statute, enlarge or abridge its jurisdiction. Gibson vs. Templeton, 62 Tex., 555; Commonwealth vs. Commissioners, 37 Pa. St., 237; Duroussean vs. United States, 6 Cranch., 307; Ex-parte McCardle, 7 Wall. 506.

The Court of Civil Appeals of Texas, fifth district, held the answer of the Supreme Court of Texas to the questions certified conclusive on the rights of these plaintiffs in error, and the Supreme Court of Texas affirmed the judgment of said Court

of Civil Appeals, and adhered to its decision and judgment on the certified questions. Whether or not the Supreme Court of Texas had jurisdiction to conclusively determine the rights of plaintiffs in error on the questions certified, and whether such determination, under the provisions of the statute quoted, was "due process of law," certainly presents a Federal question under the 14th amendment of the Constitution of the United States. We also believe there is presented a Federal question in the fourth assignment or specification of error.

"Due process of law" has been held to mean, "law in its regular course of administration through courts of justice." 2 Kent. Com., 13; Wynehamer vs. People, 13 N. Y., 395; Rowan vs. State, 30 Wis., 146. In Stuart vs. Palmer, 74 N. Y., 191, the court, among other things, said that due process of law requires a proceeding adapted to the nature of the case. And in Bartlett vs. Wilson, (R. I.) 8 Atl. Rep., 331; s. c., 4 New Eng. Rep., 119, it is said "due process of law" is not necessarily process according to the course of the common law, but process according to the course of proceedings applicable to the subject matter, and conformable to those general rules that effect all persons alike." It would not be due process of law for a court in a suit in ejectment to render judgment against the defendant on a promissory note, nor is it due process of law to render judgment against A for the value of property alleged to have been wasted or destroyed by B without, in some way showing A liable for the acts of B.

There is no allegation in the pleadings that either of the banks ever received one dollar of this so-called trust fund, or any of the property of the Hardware Co., but on the contrary, alleges that they had not been paid. The petition on which de-

fendants in error went to trial simply shows that they, with other parties, were preferred in the chattel mortgage.

The plaintiffs' second amended original petition makes the following allegation: "Plaintiffs further state that said trustee refuses to pay or recognize any claim or debt against said Hardware Co., except said preferred claims, until after the latter are all paid, and they have not yet been paid, and said trustee claims that the entire assets in his hands will not pay any debt except a portion of said preferred claims," and after charging the trustee, L. P. Harrison, with the conversion, devastavit, waste and mismanagement of the trust funds which went into his hands, says: "Plaintiffs further state that they are not sufficiently informed as to whether the said L. P. Harrison has or has not paid off any of said preferred claims or any part thereof to allege that he has or has not done so, but they allege that if any payment has been made by him out of the assets of said "Hardware Co." to any preferred creditor or creditors, or to any other person, the creditor or person who received it did so with a full knowledge of the pendency of this creditor's bill, and that no such payment or payments were made, if at all, until subsequent to the 29th day of Nov., 1889, and was paid to a person or persons, then denfendant, defendants, intervenor or intervenors in this bill. Plaintiffs further state that the defendant, L. P. Harrison, has not accounted for or paid over to the creditors of said "Hardware Co." the assets that went into his hands, but that he wasted, squandered and mismanaged said assets and the proceeds thereof." See Ext. from Tr. of record, bottom of p. 19, middle of p. 22.

Plaintiffs in error demurred to this pleading, and objected to any evidence that the banks had received any money from the trustee, because the trustee was alleged to have wasted and

converted it, which demurrer and objection were overruled by the court and a money judgment rendered against the Farmers and Merchants bank for $48,193.70, and against the Paris Exchange bank for $7,508.10, as the money received by said banks from the trustee, with interest. (Ext. from Tr. of record, p. 58).

In actions of this character, as against the banks, where it is sought to hold them liable for receiving money claimed to be traced as a trust fund, it was absolutely necessary to do so by clear averments charging that such funds went into their hands, and the amounts received by each. (Storey's Equity, Vol. 1, Sec. 533; 53 Tex., 200; 59 Tex., 150). Neither of these essential allegations were made. (See Forbes vs. Moore, 32 Tex., 196).

This pleading would have been bad as a bill of discovery, because it does not seek even a discovery of any specific property or fund. However, a bill of discovery does not obtain under Texas practice. Cargle & Dennis vs. Kountz Bros., 86 Tex., 386. It is simply a fishing bill. Ewing vs. Duncan, 81 Tex., 237.

While we understand that the erroneous decision of a state court, having proper jurisdiction, does not come within the prohibition of the 14th amendment, yet can a judgment rendered upon such pleading, taking money from the Farmers and Merchants and Paris Exchange banks and delivering it to other parties, be "due process of law?" It was said, *In re* Hatch, 43 N. Y. Super. Ct., 91: "Private property cannot be taken from one person and delivered to another person or applied to the private use of another, except by suit instituted and conducted in accordance with the prescribed course of procedure for determination of the title to property, the institution and

conduct of such suit is what is meant by due process of law." In Brown vs. Board of Levee Commissioners, 50 Miss., 479, it was said: "These terms, 'law of the land,' 'due course of law.' 'due process of law,' do not mean the general body of the law, common and statute, as it was at the time the Constitution took effect; for that would seem to deny to the legislature the power to alter, change or amend the law. * * * It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'"

Would a judgment and sentence of death, upon an indictment, charging only a misdemeanor, punishable by fine, be "due process of law," although the court pronouncing such judgment and sentence had jurisdiction? Is a judgment, rendered by a court of competent jurisdiction, taking away the property of one person and transfering it to another upon a paper simply containing a prayer for judgment, without stating any cause of action, "due process of law?" This is what we have in the case at bar. The judgments against the two banks are fundamentally wrong, and clearly violate the provisions of the Federal Constitution contained in the 14th amendment.

The questions raised in this case call into exercise the revisory powers of this court, and upon these questions this court is not bound by the decision of the highest court of Texas. Scott vs. McNeal, *supra*.

This court has said: "We shall never immolate truth, justice, and the law because a state has erected the altar and decreed the sacrifice." Gelpcke vs. City of Dubuque, 1 Wall., bottom of p. 206, top of p. 207.

The merits of this case are necessarily involved in the motion to dismiss or affirm. For if the Lyons-Thomas Hardware Co., one of the plaintiffs in error, though insolvent and ceasing to do business, had the same right under the laws of Texas to prefer its creditors, that an individual has in like circumstance, under the laws of such state, or if the statutes of Texas authorizing a corporation to mortgage or pledge its property to secure its indebtedness, applies not only to a solvent corporation continuing business, but also to an insolvent corporation about to quit business, before its dissolution or proceeding commenced against it, then in either case plaintiffs in error have been denied the equal protection of the laws of Texas, for both the right of an individual to so prefer his creditors, and the right of a corporation continuing business, to mortgage or pledge its property is conceded, both by the Supreme Court and Court of Civil Appeals of Texas, but deny that the Hardware Co. had such right as is shown by the opinions of said court in the record. There is no other independent question upon which the judgment in this case can be maintained. The motion should therefore be overruled. Lynch vs. DeBernal, 131 U. S. App., XCIV.

If any of the questions raised and decided against plaintiffs in error present a Federal question, the jurisdiction of this court has attached. This court said, in Railroad Co. vs. Maryland, in passing upon a motion to dismiss: "The counsel for both parties in this court are entitled to be heard, when the record shows the existence of a decision which gives us jurisdiction, on the soundness of that decision, on its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided, to affirm the judgment, even if the Federal question was erroneously decided." See 20 Wall., p. 645.

Counsel for defendants in error do not seem to rely much

on the motion to affirm the judgment of the Supreme Court of Texas, on the ground that the writ of error was taken for delay only.

An examination of the following authorities must convince this court (if is not already convinced) that not only was the writ of error in this case not taken for delay, but that the decision and judgment of the Supreme Court of Texas on the controling question in this case, denying the right of an insolvent corporation to prefer its creditors, is against the overwhelming weight of authorities:

White Water Canal Co. vs. Valette, 21 How., U. S. 424, and authorities there cited; Sanford Tool Co. vs. Howe, Brown & Co., 157 U. S., 312; Hotel Co. vs. Wade, 97 U. S., 13; Tramlick Oil Co. vs. Marbury, 91 U. S., 587; Upston vs. Tribblecock, 91 U. S. 45; Jones vs. Guaranty and Indemnity Co., 101 U. S., 625; Brasher vs. West, 7 Peters, 614; Graham vs. R. R. Co., 102 U. S., p. 160; 96 U. S., 258; Pyles vs. River side Furniture Co., 2 S. E. Rep., 909; 30 W. Va., 123; Warfield vs. Marshall, 72 Iowa, 666; Garrett vs. Burlington Plow Co., 70 Iowa, 697; Sargeant vs. Webster, 54 Mass., 497; McMertree vs. M. M. T. Co., 86 Ky., 206; Lexington Ins. Co. vs. Page, (Ky.) 66 Am. Dec., 165; Planters Bank vs. Whittle, 78 Va., 737; State vs. Bank of Maryland, 26 Am. Dec., 561; Railway vs. Glenn, 28 Md., 287; Catlen vs. Eagle Bank, 6 Conn., 233; Smith vs. Skeary, 47 Conn., 54; De Ruyter Trustees, 3 Barbour, ch. 125. Same case, 3 N. Y., 238; Varner vs. Hart, 119 N. Y., 101; Haxton vs. Bishop, 3 Wend. 13; Coats vs. Donnel, 94 N. Y., 178; Warner vs. Mower, 11 Vermont, 385, 20 Vermont, 444; Flint vs. Clinton, 12 N. H., 431; Dana vs. Bank, 5 W. & S., (Penn.) 223; Anderson Oil Co. vs. N. M. Oil Co., 66 Penn. St., 375; Conway, Ex Parte,

4 Arks., 304; Ringoe vs. Biscol, 13 Ark., 563, 575; Hopkins vs. Gallatin, 4 Humph., (Tenn.) 403; Arthur vs. Commercial, 17 Miss., 394; Richnold vs. Commercial Hotel Co., 106 Ill., 439; Bank vs. River Raising Co., 2 Doug., (Mich.) 530; Detroit vs. Gas Light Co., 43 Mich., 594; Chew vs. Ellingwood, 86 Mo., 273; Foster vs. Mullanphy, 92 Mo., 79; Bergin Porpoise, etc. Co., 8 Atl. R., (New Jersey) 523, 42 N. J. Eq.; Wilkins vs. Bourle, 7 Atl. R., (New Jersey) 514, 41 N. J. Eq. 635; Vail vs. Jamison, 7 Atl. R., (New Jersey) 520, 41 N. J. Eq., 61; McCallis vs. Walton, 37 Ga., 611; Tripp vs. Bank, 41 Minn., 400; Warnsocket Rubber Co. vs. Falley, (Ind.) 30 Fed. R. 808; Lippincott vs. Shaw Carriage Co., (Ind.) 25 Fed. 577; Jones vs. Bank of Leadville, 10 Colorado, 464; Milroy vs. Eager, (Neb.) 30 Fed. Rep., 544; White vs. Pettis, 30 Fed. Rep., 864; Fitch vs. Lewistown, etc., (Me.) 5 N. Eng. Rep., 862; 1 Jones on Mortgages, Sec. 102; Am. and Eng. Encyp. of Law, Vol. 4, p. 218, paragraph 4; Id. p. 220, paragraph 6, 7, and authorities cited in notes 1 and 4; Jones on Chattel Mortgages, Sec. 51; Waite on Insolvent Cor., Sec. 162, pp. 140, 141, Id. Secs. 653 and 654; Id. 87; 2 Morawetz on Cor., Secs. 802 and 803; Angel and Ames on Cor., Secs. 187, 191, pp. 171, 172; Burrell on Assignments, page 84; Cooley on Con. Lim., pages 167 and 163; 1 Storey Eq. Jur., Sec. 370; 2 Kent Com., 11th Ed., p. 382, Sec. 33, last page, also Sec. 29, p. 532; 2 Watterman on Corp., p. 658, Sec. 345; Boone on Corp., p. 204; 4 Am. and Eng. Ency. of Law, p. 220, notes 1 and 4, and authorities cited; Waite on Fraudulent Conveyances, Sec. 119; Id. 139; 1 Lawson's Rights, Remedies and Prac., Sec. 384, note and authorities cited; Ballew vs. Loeb, et al., 78 Wis., 411; Rollins vs. Schafer W. & C. Co., 80 Iowa, 380; Gould vs. Little Rock,

M. R. & T. R'y Co., 52 Fed. Rep., 680; Railroad Co. vs. Clayborn, 1 Speers, (S. C. Ch.) 545; Buell vs. Buckingham, 16 Iowa, 284; McMertree vs. M. M. T. Co., 86 Ky., 206; Pond vs. F. & L. R. Co., 130 Mass., 194; Burch vs. West, 134 Ill., 358; Eureka Works vs. Bresman, 60 Mich., 332; Breen vs. M. & M. Bank, 11 Col., 97;* Am. & Eng. Ency. of Law, Vol. 11, p. 212, paragraph 17. *A corporation, though insolvent, and in consequence thereof ceasing to carry on its operations, may pay or secure a creditor, up to the time some action is taken by its creditors to wind up such corporation and distribute its assets rateably. Turnbull vs. Prentis Lumber Co., 55 Mich., top of p. 396; Hankins vs. Glenn, 131 U. S., 319; Atlas Bank vs. Bank, 23 Pickering, 480; Van Alstine vs. Cook, 25 N., 489; Barnum vs. Hart, 119 N. Y., 101; Paulding vs. Crome S. Co., 94 N. Y., 335; Chautauque Co. Bank vs. Risley, 19 N. Y., 369.

Respectfully submitted,

JAMES G. DUDLEY,

Counsel for Plaintiffs in Error, Lyons-Thomas Hardware Company, Et Al.

DEC 2 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE LYONS-THOMAS HARDWARE CO., &c.,
vs.
THE PERRY STOVE MANUFACTURING CO., &c.
No. 717.

On Motion to Dismiss or Affirm.

Additional Brief for Plaintiff in Error against the Motion.

In addition to the very exhaustive argument of our co-counsel in this case, Mr. Dudley, we beg to submit a few suggestions to the court more immediately upon the practice touching such motions.

The motion itself is very meagre and fails to state specifically and directly the points relied upon; containing, simply, general averments without reference to any authorities to sustain them, and it asks the court, first to dismiss the case, and then to affirm it, but fails to show how the court could do both. But we take it that it was intended to say, "to dismiss *or* affirm."

Besides this, so much of the record as is printed here is very partial, and does not enable the court to pass upon this motion without reference to the transcript or the whole record. We insist, therefore, that under the uniform practice of the court this motion must be denied.

Callan *v.* Bransford, 139 U. S., 197;
Lynch *v.* De Bernal, 131 U. S., Appendix XCIV.

It must be perfectly plain to the court, that this motion means to take a very important case, upon a large record, out of its order and get it disposed of without full argument and mature consideration. It is submitted, that this is a case of too much gravity to be passed off, upon a motion of this kind, upon such a fragmentary record as presented.

The opinion of the court below (Addl. Ex. Rec., p. 39, *et seq.*) shows the Federal questions passed upon as indicated in the petition for a writ of error. (*Ib.*, p. 29, *et seq.*)

But looking even into the record that is printed, the Federal questions are disclosed to the fullest extent—indeed there is scarcely anything else in the case, going to its essence, but Federal questions, and where the record makes this manifest, whether appearing in the opinion or not, this court has jurisdiction.

Kaukauna Co. *v.* Green Bay Co., 142 U. S., 254, and cases cited.

The State court could not, by evading the question, or concealing it, deprive this court of the right to review under sec. 709, R. S.

Chapman *v.* Goodnow, 123 U. S., 540.

It is respectfully insisted upon, therefore, this motion be denied.

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For Plaintiffs in Error.